

Sept. 1.

43

At Brit. Court of King's bench

A
REPORT
OF
CASES

S

Argued, Debated, and Adjudged
in *B. R.* in the Time of the late
Queen *ANNE*.

ESPECIALLY

In the IV, V, VI, VII, and VIII

Years of her REIGN:

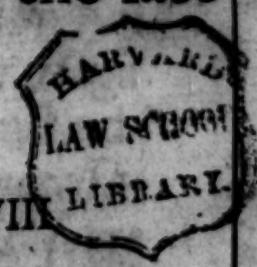
During which the late Lord Chief
Justice *HOLT* presided in that Court.

WITH

Two Alphabetical TABLES; the one of the Names of
the CASES, the other of the Principal MATTERS.

In the SAVOY:

Printed by E. and R. NUTT, and R. GOSLING, (Assigns of *Edw. Sayer Esq;*) for B. GOSLING, at the Crown and Mitre against Fetter-lane in Fleet-street, and D. BROWNE, at the Black Swan without Temple-Bar. M DCC XXXVII.



REPORT OF CASES

Argued, Debated, and Adjudged
in B. R. in the Time of the late
Queen ANNA



REPRODUCED

In the IV, V, VI, VII, and VIII
Years of her Majesty ANNA

During which the late Lord Chief
Justice WILKES presided in that Court

WITH

Two Alphabetical Tables: the one of the Names of
the Cases, the other of the Principal Matters

In the SAVOY

Printed by E. and M. NUTT, and R. GOSNOLD, (Assigns of Adam
Zuercher) for B. COOPER, at the Green and White Man
Printers in Fleet Street; and J. JOHNSON, at the Strand.
From William Lawton-Bar. M DCC LXXVII.

PREFACE.

THE Editor of this Report begs Leave to offer a few Words; 1st, As to the Contents of the Work; and 2dly, of the Motive or Cause of its Publication.

1. The former of these may (in General) be seen in the Title Page, and in the Table at the End. But as the Title Page imports Cases argued, debated and adjudged, in B. R. only, it may be necessary here to inform the Reader, That some few Cases will herein be also found, which were argued and adjudged in C. B. Of this Kind are those of Archer and Bokenham, from Page 148 to 163, and Abbot and Burton, from Page 181 to Page-- &c.

2. The Motive or Cause of its Publication, was chiefly to supply a Lacuna or Chasm, that at present appears in our Printed Reports; for the Editor hereof observing, that Faresley, 6 Mod. &c. proceed no farther than the End of the third Year of Queen Anne; and that Cases in Law and Equity begin with the 9th of the same Queen, (and consequently, that there was a Vacuum of at

least

least five Tears;) he could not but apprehend it might be of some Use and Benefit to his Profession, to publish such Cases as had occurred in B. R. during that Interstitium, which ends with the Death of Sir John Holt Knt. late Lord Chief Justice of that Court.

And as in preparing of this Work, the Editor found certain Cases of Excellent Learning argued and adjudged in C. B. (as is before observed) he thought himself obliged to communicate those also to the Publick.

Nor are other Cases herein contained, which prima facie may seem of small Import, to be for that Cause totally rejected; For (as the Lord Ch. Just. Coke long since observed,) there is no Case in the Law, however immaterial or insignificant it may at first Sight appear, but some Time or other will stand a *studious* Reader and diligent Practiser in good Stead.

To such Readers, To such Practisers, is this Report recommended.

Middle-Temple.

PAGE 72. read *Kirker* for *Kirker*, p. 99. l. 30. *maks* for *shaks*, p. 100. *Soley* for *Soley*, p. 119. l. penult. of for *to*, p. 191. for *Anonymous* r. *Hunt's Case*.

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			Easter

Easter Term, 1702.

1 Anna Reginae in B.R.

Note; In this and some succeeding Terms the following Opinions were obiter delivered by the said Court of B.R. Holt Chief Justice.

1. **W**HEN a Trial has been twice had on the same Issue, and both Verdicts agree, it would be unreasonable to grant a new Trial: But if a Sheriff returns a Jury contrary to a Rule of Court, or commits any such Irregularity, to the Prejudice of either Party, it may be a good cause to set aside the Verdict, &c. But when no material Cause can be shewn, this Court will always have too great an Esteem for a Verdict, as to grant a new Trial. And yet when any unforeseen Accident happens, or some sudden Impediment, as Sickness, &c. to a Witness, and a Trial is had, and a Verdict given for the Plaintiff, which might have been given for the Defendant, had that Witness been produced, in such Cases this Court will grant a new Trial, on paying Costs of the former Trial.

2. Where a Trial is had upon a View, this Court will not easily be induced to grant a new one: For the View is supposed to govern the Jury more than the Evidence at the Trial; and therefore in such Cases, there ought to be some great Irregularity in the Jury, to obtain a new Trial.

B

3. Where

Dormant
Bond.
6 Mod. 22.
Cases in Law
and Equity,
273.
Chan. C. 102,
&c.
2 Vent. 350.

3. Where a Bond for Payment of Money has lain dormant twenty Years; if on an Action brought thereon, the Defendant pleads *Solvit ad diem*, Holt Ch. J. said, This will be a good Plea, &c. For it is a strong Presumption the Bond has been satisfied, where there has been no Demand made, nor Action brought thereon, in so long a Time.

Bail on Error,
Bond to pay,
&c.

4. Note; By the Stat. 3 Jac. 1. c. 8: when a Writ of Error is brought on a Judgment had upon a Bond to pay Money (only), there special Bail ought to be given: And after a Year, a *Scire Facias* ought to precede the *Levari*, or *Fieri Facias*.

Bail, &c.

5. If one, who becomes *Bail*, has a Warrant of Attorney to indemnify him, yet he cannot enter it up, and take out Execution upon it, till some Process is gone out tip on the *Bail-Bond*, whereby he has an Injury done him.

Bail.

6. Notice of Bail (on an Arrest, &c.) ought to be not only by a Note given of the Parties Names who are to be Bail, but also of their Addition, Trade, Substance and Place of Abode; that so they may be the more easily inquired after by the Plaintiff or his Attorney.

Original Writ.

7. When the Suit is by original Writ, the Statute of *Jeofails* will not help a bad Writ (original); *contra*, where the Suit is by meane Process, as *Bill of Midd*, *Latitat*, &c. For the Difference herein between Trespas and Trespas on the Case, see *Hob*, 180. 2 *Cro*. 542.

Imparlanee.
Nil dicit.

8. An Imparlanee ought not to be granted, unless it is prayed or asked by the Party; and on a *Nil dicit* Judgment is to be given *Instantor*.

Plea in Abatement.

9. Pleas in Abatement must be within four full Days in Term: For if a Declaration be given four Days before the End of a Term, the Defendant cannot plead in *Abatement* the next Term; nor will a Plea in Abatement be allowed *ordinarily* after a general Imparlanee. See *Instit. Legal*. p. 518, 519. *Salk*. 367.

Ill Plea.

10. If A. puts in an ill Plea, and B. joins issue upon it, and a Verdict is given against B. now shall B. never take Advantage of A's bad Plea, having slipt his Opportunity of demurring to it: But it may be aided by the Statute of *Jeofails*.

11. Before

11. Before one moves in Arrest of Judgment, the *Postea* ought to be in Court; and delivered to the Clerk in Court; and after it is so brought in, the Counsel have four Days to move in Arrest of Judgment; nor will the Court grant a Rule to alter or amend a *Postea* after it is returned and filed. — *Quære*, If not frequently done, if in the same Term it is filed.

Arrest of Judgment and *Postea*.

12. *Note*; The Court will not incline to grant a *Certiorari* to the Justices of Peace when a Person is convicted: But the Justices ought to give Judgment; for a *Certiorari* to Justices is rather to aid them, when a Man would creep out of their Jurisdiction, and so to bring him into this Court, which has a more extensive Power to punish (him). *Q.*

Certiorari to Justices of Peace.

13. A Motion to quash a Writ taken out by the Party himself, is not grantable of Course, but some sufficient Cause ought to be shewn to the Court.

Motion to quash his own Writ.

14. It is not necessary against a wrong Doer to set forth any Title; *i. e.* whether by Prescription or otherwise; especially where the Action is grounded on the Possession.

Title.

15. *Note*; The Word *Scienter* was held necessary to be inserted in an Indictment of Forgery. *Q.*

Scienter.

16. *Note*; Before a Hawker, Pedlar, or the like, can be deemed a Vagrant, he must be wandring abroad, and out of his own Parish.

Vagrant.

17. If a Prisoner makes a negligent Escape, and afterwards, upon an Agreement between him and the Plaintiff, at whose Suit he is in Execution, the Plaintiff discharges him, the Marshal or Gaoler cannot take him; for the Retaking him, and rendring him to the County-Gaol upon the late Statute, is only a Shifting the Gaol, and is wholly founded upon the original Process, and only a Continuation thereof. Mr. Justice *Powell* put this Case: Suppose the Marshal suffers an Escape, and then by Virtue of the late Act of Parliament, by a Judge's Warrant, the Plaintiff retakes him, If Escape lies against the Marshal? To which the Court gave no Answer.

Prisoner. Negligent Escape.

18. If a Person is in the Custody of the Marshal at the Suit of *A.* and *B.* in the Vacation-time would charge him

Prisoner charged in Custody.

him there; Q. how it must be done; for arrest him he cannot, because he is already in Custody; and file a Bill, the Clerk said, he could not do in the Vacation, nor deliver a Declaration but in Term-time; so that unless a *Remanet in Custodia*, enter'd in the Marshal's Book, should be a Charge sufficient to ground an Escape upon, the Party would be without Remedy; and so, for the Necessity, the better Opinion of the Court seemed to be, that it was a good Charge: Then a Question arose, What Time the Plaintiff had to declare; in which the Clerks of the Court differed: For some held, it ought to be the Term following; others said, he had two Terms to declare in; but *Holt* said, That was too long to keep a Man in Custody upon a *Remanet*, and ordered a Reference to Mr. Clerk, who said, the Plaintiff ought to deliver a Copy of the Declaration to the Turnkey, or Marshal, some Time the next Term; but *Powell* thought the Plaintiff had two Terms.

A *Remanet in Custodia* charges only the Marshal, after an Escape.

19. But *Note*; By *Holt* Ch. J. A *Remanet in Custodia* will not charge a Prisoner that has escaped, though the Marshal should own him to be a Prisoner in Custody: And he also said, it was against Law to charge a Man in Custody that is not in Custody; for if he has escaped, he cannot take Notice of any Proceedings against him in a Place where he is not. But the Marshal's Owning a Person to be in his Custody, will make the Marshal liable to an Escape, and charge himself. If a Person in Custody goes out of Prison, and returns again (at Night); and does so frequently; This *Holt* said was a Continuance of the Custody *ab initio*, and he might be charged with a *Remanet in Custodia*, or a Declaration; for by his returning into the Prison, he may have Notice of the Proceedings against him.

Recognizance.
Indictment.

20. If a Person enters into a Recognizance to go to Trial of an Indictment, and by his own Act he procures a wrong *Venire facias*, so as the Indictment is quashed; *Holt* said, this was a Forfeiture of his Recognizance; it being a Trifling with the Court, and an ill Practice in putting the Prosecutor to a great Charge.

21. The

21. The Printer of a Pamphlet, called *Legions Address*, ^{Importance of an Information.} was bound to appear in the Queen's Bench the first Day of the Term, and then Mr. Attorney exhibited an Information against him; the Defendant's Attorney prayed an Imparlancc; and the Question was, how long Time he should have to imparl? Mr. Attorney prayed it might be ruled according to the Civil Side, viz. to plead some Day within the Term; but the Clerks said, the Custom on the Crown Side is to give a Term. *Holt* said, formerly they went upon this Reason, That the Term, in the Eye of the Law, is but one Day: But he said, there being an Imparlancc due by Law, he thought it would be hard to make a Rule to govern this Case; and ordered the Clerk to search Precedents.

22. *Quere*; If Tenant in Tail contracts Debts by Bond, ^{An old Mortgage, Affin.} and dies, and it can be made to appear, that some of his Ancestors, who bought the Estate, found an old Mortgage upon it for a long Term for Years, which was kept on Foot to wait upon the Freehold and Inheritance; If such Lease in Equity would not be Assets in the Hands of the Heir in Tail: For 'tis Equity only makes such Leases descend, and 'tis the highest Equity a Man's Debts should be paid.

23. All Prohibitions are to be granted upon some Suggestion, and not otherwise; which Suggestions are to be brought into the Office. But *Quere of Prohibitions to the Admiralty*. For the Court of Admiralty does not use to set forth the special Matter whereon they give Sentence; but only reciting, that they have heard both Sides, and so proceed to give Judgment: And then (they pretend) 'tis too late to move for a Prohibition: But *per Holt Ch. Just.* 'Tis never too late to move for a Prohibition after Sentence, in any ^{after Sentence.} Case but one, and that is to the Ecclesiastical Court, on the Statute 23 H. 8. where the Suit is out of the Diocese. And the Reason why a Prohibition is denied in that Case is, because you have by Pleading owned their Jurisdiction. See *Cumberba.* 234, 253, 448, 459, 463. *Shower* 333, 396, 179.

24. And *Note*, altho' in *Hob.* 79. a Rule is laid down, ^{Note.} That for any Thing not appearing in the Libel, but only suggested

Spiritual
Court.

suggested as Matter collateral to it, no Prohibition shall go after Sentence: Yet in 1 *Show. 172. Shatter* ver*s.* *Friend*, a Prohibition went to the Spiritual Court after Sentence, where they had disallowed Proof by one Witness, tho' that Matter did not appear in the Libel (or Sentence): And *Dolben* in that Case said, That a Prohibition ought to go rather after Sentence than before; for then 'twill best appear that they have disallowed such Proof.

Prohibitions
after Sentence.

25. For Prohibitions after Sentence, see 1 *Sid. 65, 332. 1 Show. 158, 172. 6 Mod. 252. Farfl. 148 and 337.* See the Case of *Edmondson* ver*s.* *Walker*, 1 *Show. 179.* A Prohibition to the Admiralty for refusing a Plea of Claim of Property. And see 6 *Mod. 26.* Where a Prohibition shall go if they refuse a Plea of the Statute of Limitations. But Note;

Limitations.

26. In Term 1 *Annæ*, The Opinion of this Court seemed to be, That the Statute of Limitations, 21 *Jac. 1. c. 16.* did not extend to the Admiralty nor Spiritual Courts; for *Holt C. J.* said, If a Battery was committed *super altum Mare* above four Years since, if the Plaintiff sues for this in the Admiralty, he may well recover Damages there. See 3 *Levinz 23 and 234.* And Suit in the Spiritual Court is only *pro reformatione morum, &c.* And Note by Stat. 4, 5 *Annæ*, No Prohibition shall be to the Admiralty Court, on a Suit there for Seamen's Wages.

Stat. 4, 5
Annæ c. 16.
§. 18.Redemption
of Ships, &c.

27. Redemption of Ships, &c. is a Species of *Salvage*. For if a Pirate takes a Ship, and the Master redeems the Goods, the Owner shall make him Satisfaction: For a Master of a Ship represents the Owners, and may detain Goods for *Salvage*. But if he once parts with them out of his Possession, he cannot afterwards take them by any Admiralty Jurisdiction or Process. For if the Goods are on Land, and the Admiralty arrest the Goods, a Prohibition will go, if there is a Libel; but if there be no Libel, *Replevin* or *Trespas* is more proper.

Peculiars.

28. If a Sentence is given in a Peculiar, the Appeal is to the Archbishop, and not to the Bishop of the Diocese; which proves it to be of exempt Jurisdiction. See *Jones* ver*s.* *Jones* in *Hobart*.

Certain

Certain Cases heard and adjudged in the said Court of B. R. in the same Easter Term, 1 Annæ Reginae.

Stanmer against Davers in B. R.

(1.) **I**N this Case it was held *per Holc and Curia*, That whenever an Action is brought in an Inferior Court or Jurisdiction, the compleat Cause of Action must be laid to arise within the Jurisdiction; and if so, whatever Matter lies in Aggravation, need not be laid within the Jurisdiction: As if an Inn-keeper suffer my Horse to be taken out of the Stable, without my Consent, it is a compleat Cause of Action; for thereby he is a Wrong-Doer: And tho' the Riding and Beating be done out of the Jurisdiction, yet the Inferior Jurisdiction may hold Plea of it: The compleat Cause of Action arising from the first Taking; and the subsequent Matter only being an Aggravation. And Note; this was on a Writ of Error of a Judgment in the *Marshalsea* Court; & *per tot' Cur'*, Judgment was after affirmed in the Queen's Bench, *viz.* in *Mich. Term*, 3 *Annæ*. See 6 *Mod.* 223, 224. *Raym.* 75. 1 *Sand.* 73. 1 *Sid.* 95. 1 *Lev.* 50, 69.

6. C. 6 *Mod.*
223. 1 *Salk.*
404. See 1
Sand. 73.
Inferior Juris-
diction.
1 *Sid.* 95, &c.
Infra.

Anonymus.

(2.) **I**F a Lessee for Years builds a House on the Premises leas'd, 'tis Waste; and if he let it fall, 'tis a new Waste. If a Man has an Upper-Room, an Action lies against him by one that has an Under-Room, to compel him to repair his Roof: And so where a Man has a Ground-Room, they over him may have an Action to compel him to keep up and maintain his Foundation. See *Stat. Westm.* 2, c. 23. 2 *Inst.* 403. *Moor* 374. 6 *E.* 4. 7. *Kelw.* 98. *Reg.* 153. *Sed Quære.*

Nuisance by
New Build-
ings, &c.

For, if a Man builds a new House, under the Roof of an old House which is ready to tumble, if he shall have a Writ *De reparatione facienda*? because *Debet* & *Solet* or *consuevit* are necessary Words in the Declaration. 1 *Vent.* 174. And

Cro. Jac. 43. *Dent and Oliver in Cro. Jac.* Where a Man may have an Action to charge a Ter-Tenant; he must lay a *Debet & Solvet*, and shew a Title.

Holt Ch. J. said, Every Man of common Right ought so to support his own House, as that it may not be an Annoyance to another Man's: But *Powel Just.* put this Case; Suppose a Man makes a Vault, and builds a Wall thereto, and then his Neighbour makes a Cellar adjoining to the Vault, which is damaged by a Default in the Wall of the Vault, he thought that the Owner of the Cellar might well have an Action: Which *Holt* denied; for by him, Before the Party could entitle himself to an Action in that Case, he ought first to build a Wall to his Cellar, as well as the other to his Vault; otherwise he ought not to have any Benefit from the *first Wall*; unless it be indeed agreed, that he shall contribute to the Repair of it, &c. Suppose a Man has a vacant Piece of Ground, and builds a House upon Part of it, and then sells the rest, the Vendee cannot build so as to stop up any Lights in the first House; but must take the Ground subject to the Incumbrance of the former Lights.

Cooper vers. the Hundred of *Basingstoke*.

See this Case imperfectly in 2 *Salk.* 614. and *Farely* 157.

A. assaulted and seized in the Hundred of *B.* but led thence and robbed in the Hundred of *C.* the Hundred of *C.* is chargeable.

(3.) **A**ction on the Statute of *Winton*. Upon a Special Verdict the Case appeared to be this:

Highwaymen assault the Plaintiff in the Highway, in the Hundred of *Micheldever*, and lead him out of the Highway into a Cops near adjoining; which Cops was in the Hundred of *Basingstoke*, and there they bind and rob him: And the Question was, whether the Action was well brought against the Hundred of *Basingstoke*.

The Counsel for the Plaintiff insisted, that the Action was well brought against the Hundred of *Basingstoke*: And the Robbery in the Hundred of *B.* could not so relate to the first Assault in the Hundred of *M.* as to make it a Robbery in the Hundred of *M.* and insisted on two Rules; *First*, That the Law never operates by Way of Relation.

Relation, but in case of Necessity, to prevent a Wrong, or to do Justice. Secondly, That a Relation of Law shall not operate to the Injury of a third Person. However an act may relate, by Fiction of Law, between the Robbers and the Party robbed; but yet it shall not relate to the Prejudice of the Hundred. *Hutton* 125. *Goldbr.* 86. pl. 11.

The Counsel for the Defendant insisted, that the Action ought to be against the Hundred of M. where the first Assault was; and that the Rest is but one continued Act. That the Fault was in the Hundred of M. where the Assault was in the Highway; but the Robbery was not in the Highway in the Hundred of B. and the Hundred is not obliged to guard other Places. 6 Co. 61. *Cro. Car.* 266. That a Traveller going through a new Way laid out shall not have an Action against the Hundred.

The Action ought to be against both Hundreds: And one Reason why, if a Robbery be *in divisis Hundredis*, both shall be liable, is, because both are in Fault in not keeping Watch.

In *Mich.* Term following this Case was spoke to again by Mr. King for the Plaintiff, who said, that the Action was well brought against B. for that the Hundred in which the Taking the Goods was is only chargeable: And insisted on the Words of the Statutes 13 Ed. 1. 28 Ed. 3. 27 Eliz. all which mention the Hundred where the Robbery is done. Robbery is a *Species* of Theft, and differs from common Larceny only in the Manner of taking. *Hale's Pl. Cor.* 71. 3 *Inst.* 69. And to make a Robbery, there must be a Taking the Goods from the Person of the honest Man into the Possession of the Thief. *Hale* 72. 3 *Inst.* 68, 69. Assault to rob a Man is no Robbery: Then the Hundred of *Basingstoke* is the Hundred where the Robbery was committed; for the Goods were there taken from the honest Man. 3 *Inst.* 80. All Crimes are local, and must be tried where committed. 13 Co. 53. *Hale's Pl. Cor.* 69. And therefore if the two Hundreds were in two Counties, it must be tried in the County where the Taking from the Person of the Man was.

Obj. That a Man may be said to be robbed where first assaulted; for he and all about him is in Possession of the

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Thief;

Thief; and the subsequent Act shall relate to the first Act.

Ans. The Assault is no Robbery. *Hale's Pl. Cor.* 71. Relations are but Fictions in Law, and never used but in Cases of Necessity, 3 *Cro.* 28. But here is no Need of such Relation.

Obj. That the first Default is in the Hundred of *M.* in not keeping due Watch.

Ans. That is grounded on a wrong Construction of the Intent of the Statute. For the Design of the Statute is not only to punish the Hundred, for not keeping Watch; but to punish them if they do not take the Offender after the Robbery done, and to fortify the Common Law, by which the Hundred was to be amerced, if they did not take the Robbers; as appears in *Bracton, Coron.* 3. *b. Fitzb. Coron.* 238, 293, 352. *Stamford Pl. Cor.* 336. And the Statute of *Winton* was made in Affirmance of the Common Law. 3 *Inst.* 117. 2 *Ed.* 3. 6. *b. 7. a. Hutton* 125. *Goslbr.* 86. A Case had been cited on the other Side, 1 *Sid.* 263. Where Robbers drive the Waggon out of the Way in the Day-time, and rifle it in the Night, it shall be said a Robbery in the Day, and another in the Night; but both these are extrajudicial, and not the Point in Question. (*Note; the Book does not say so.*)

To the *Obj.* That the Action ought to be against both Hundreds, it was answered, that the Statute gives it only where the Robbery is *in divisis Hundred*, and not elsewhere. The Authority of the Case in 1 *Cro.* 266, where a Traveller going through a new Way cannot bring an Action, may be questioned: Because it goes on that Foundation, that the Design of the Statute is only to guard the Highway, and not to take the Robbers. And a Case in 1 *Mod.* 221. *Savil* against the Hundred of --- is express in Point.

Broderick for the Defendant argued, That the Statute has always been construed equitably; and that the Design of the Act is to give an Action against that Hundred, which by the Common Law should have been amerced; and insisted on the Title of the Statute, That it is the Duty

Duty of the Hundred only to guard the Highway: And it must be supposed, that the Robbery was committed in such a Place from whence Hue and Cry could be made. To the Case in 1 *Mod.* 221. It was answered, that the Exception taken there was only, that it was not laid in the Declaration to be done in the Highway; and that need not be any more than to lay it to be done in the Day-time. But there are many Authorities that confine it to the Highway. 3 *Lev.* 262, or 162, 350. 2 *Cro.* 497. *Moor* 620. *Golsbr.* 60. *King v. Smith*; the River of *Thames* is adjudged to be a Highway within that Act. That the general Practice is to watch on the Highways only, which is a traditionable and reasonable Exposition of the Act. That if a Hundred be answerable for a Robbery, within an Inclosure, yet the right Hundred is not charged. For *M.* suffered the Traveller to be assaulted, and in Consequence of that Negligence the Party was robbed: But it does not appear but that the Highways in *Basingstoke* were well guarded.

In *Hill.* Term following, the Lord C. J. *Holt* gave Judgment for the Plaintiff, that the Action is well brought against the Hundred of *Basingstoke*. Curia.

It has been endeavoured to be maintained, that the Robbery was begun in the Hundred of *M.* but it is plain it was committed in *B.* If there had been two Counties, as they are two Hundreds, the Trial must have been in the County where the Robbery was; and the Robbery being in *B.* the express Words of the Statute are, that that Hundred shall be liable.

There is no Reason to make it relate to the first Assault. A Stroke is given one Day, and the Party dies another, the Death shall relate to the Day of the Stroke, so as to charge the Lands, but not to collateral Purposes. A mortal Wound is given, and the Party dies a Month after it, the Death shall not so relate to the Stroke, as to make him, that before the Death receives the Murderer, an Accessory.

11 *H.* 4. f. 49. and *Plowden* 401.

A Pardon of all Offences is granted after the Stroke, and before the Death, this Pardons the Stroke; and tho' the Party die, the Murderer is discharged. But here there

is no Colour for a Relation, for the Assault is not the direct Cause of the Robbery. It may be a *Causa sine qua non*, but not the necessary Cause. This is the same Point that was determined in *Huttoh* 125. *Dean's Case*. The Case in *Golsbr.* allows of this Case.

Note.

Thieves take the Horses from the Carrier in one Hundred, and rifle the Packs in another, the first Hundred shall be charged; because it was a Robbery in that Hundred: But if the Carrier had led his Horses himself into the second Hundred, the second Hundred should have been charged.

The true Reason of this Case is, that the Hundred of *Basingstoke* is charged, not because they did not prevent the Robbery, but because they have not taken the Malefactors: For if a Robbery is committed, that does not charge the Hundred, if within forty Days they apprehend the Thieves. Here was no Obligation on the Hundred of *M.* to pursue or apprehend them, because no Robbery in their Hundred.

If the Assault had been in one Hundred in the Day, and the Party was carried into another Hundred, and kept till Night, and there robbed: Or if he was assaulted in the Highway in one Hundred, and carried to a House in another Hundred, and there robbed; in either of these Cases no Action had lain.

Lane and others against Cotton in B.R.

Action on the Case against the Post-Master for Loss of Exchequer-Bills and Letter, delivered in at an Under-Office. See the Case imperfectly reported in 5 *Mod.* 455. *Salk.* 17, 18. and *Cartbrow* 487.

(4.) THIS Term the Court of Queen's Bench gave Judgment in this Cause, which had been argued several Terms at the Bar: The Case was thus; *viz.* In an Action on the Case, the Plaintiff declares upon the Stat. 12 *Car.* 2. which establishes the *General Post-Office*; setting forth the said Statute, with the Exceptions therein, and then sets forth, That he delivered several Exchequer-Bills, inclosed in a (Letter) Cover, at a certain Place, unto a certain Officer there, appointed by the Post-Master to receive Letters and Parcels (to be conveyed) to the said General Post-Office:

Office: Which said Letter and Bills so delivered miscarried, and came not to the Party's Hands to whom they were directed.

And on Not guilty pleaded, the Jury found a special Verdict; in which all the said Matter set forth in the Declaration was found, and further, that the said General Post-Master takes Security of his Under-Officers; and that the Letter, (Cover) in this Case, was broke open, and the Bills taken out by a Person unknown. And the Question was, Whether an Action lay against the Post-Master for the Nonfeasance (Negligence) of his Under-Officers.

Could Just. argued, That Judgment ought to be given for the Defendant, and that upon Consideration of the said Act of Parliament, viz.

First, This Office was designed by the Act to be a Letter Office (only,) for the Benefit of Commerce, by the quick Dispatch of Intelligence: And if it should happen, that a Letter should miscarry, yet no Action will lie for this Loss: For tho' a Man may have a Property therein, yet that Property is *nullius Valoris*, of no Value or Esteem in Law: Especially if it be only the Communication of a Man's Mind, and no Obligation contained in it. And by this Reason will this Case be ruled: For tho' these Bills out of the Exchequer were of Value, and Trover will lie for them, yet they were conveyed here as Letters and so shall not have a worse Effect, as to the Post-Master, than Letters.

Secondly, Here is no such Thing as a Contract between the Plaintiff and the Post-Master: For he is by a *Medium* the King's Officer. But if there is any such Thing as a Contract, it is between the Plaintiff and the Under-Officer, who took the Letter of the Plaintiff; and there is a Trust reposed in the Under-Officer by the Act; and tho' such Under-Officer is nam'd by the Superior, he is in as it were by the King; and suppose the Post-Master should die, the Under-Officers should be continued, and their Places are not void thereby; and then suppose this should have happened in such Vacancy, then this Under-Officer should undoubtedly be only chargeable.

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Thirdly,

Thirdly, The Act has provided, that if any of the Under-Officers commit any Fault, they shall be cashier'd, or turn'd out; and so every Officer by his Superior, and the Head-Officer by the King; as appears by the sixth and tenth Paragraphs. Another Consideration is, they are obliged to take in all Letters and Parcels brought to them; if they might refuse them, it might be otherwise. Another is, That they are obliged to make Speed, and to travel by Night, when the Law does not allow them the Protection of the Statute of a Hue and Cry, *Winton*: And then as to *Moffes's Case*, cited on the other Side, which was, Where Goods were put on board a Ship, to be sent beyond Sea, and were stole out of the Ship, in the Port, by the Negligence of the Master; and adjudged the Master should be answerable; here is this Difference between this and that Case, That the Master of the Ship makes his Bargain for his Carriage, Half of which is paid down before-hand, which is a Contract, and so at his Peril he is to procure safe Carriage; but in this Case the Recompence is not variable on the Contract of the Parties; and their Revenue or Profit, that arises out of this Office, is but by Accident, and not by Contract.

Fourthly, If there were a Trust, designed by this Act, to be reposed in the Post-Master, and the Law did allow the same Trust to be in him, as in a Carrier, a Master of a Ship, Insurer, &c. yet this particular Case is out of the Act of Parliament; for it is designed by that Act that he shall only take the Trust of Letters, and not of Treasure, as these Bills are.

Powis Just. First, He considered the several Statutes that establish Exchequer-Bills, and upon the whole concluded that they were not *Treasure*, nor of the Nature of *current Coin*; his chiefest Reason was, because no Subject was obliged to take them in any Payment; neither were they a sufficient Tender, and so they were Things that were not forbid to be carried by the Post, if any Person would venture them. But *2dly*, he urged, That the Officers were not responsible for any Thing that was lost by Accident; and no Mifseafance could be charged upon any of the Officers;

fficers; for the special Verdict finds it to be done *by a Person unknown*: Then he insisted upon the Inconveniences the Officers of the Post-Office were forced to undergo, because they were obliged to Speed; that they were often forced to deliver the Letters to the Servants, &c. of the Person to whom they were directed; and then when the Party has received them safe, he may be alone when he opens them; and tho' he does safely receive such Things as these Bills in a Letter, yet he may pretend he has lost them; and that they being obliged to travel on Sundays, by Night, and in Countries out of the King's Dominions; and therefore they have not the Protection as others have in Case of Robbery; and then their *Premium* is so small, that it bears no Proportion to the Trouble they have; and if these Actions were encouraged, it would set up a Kind of Insurance for Carriage, and in a little Time destroy the Office.

3^{dly}, The Post-Master General is not answerable for any Neglect in the Inferior Officers; for he is but a Fellow-Servant with them; by the Patent he has a Salary appointed for him, and the Under-Officers for them; and it is the King, and not he, that is their Pay-master; and moreover the Patent appoints their Security to be given to the King; and all their Salaries are to be paid to them by the Receiver General out of the Publick Revenues of the Kingdom, and the *Quantum* is settled by the Patent; and the Post-Master General has his Office *durante beneplacito*:

But it may be objected, that here may be a Wrong sustained without any Remedy. *Answ.* It is often so when no Person can be found against whom to have the Remedy; so here the Verdict finds it done *per Personam ignotam*. So he concluded Judgment *pro Def.*

Turton was of the same Opinion; and upon the same Grounds.

Holt, Cap. Just', was of Opinion, That Judgment ought to be given for the Plaintiff; and he said, it might be some Question, whether this Action would lie, if Things had been lost upon the Road in travelling; but it being found by the Special Verdict in this Case, that they were lost out

out of the Office, all the Arguments relating to that are out of the Case.

1st, This Act was made for the publick Good; and there is a Trust reposed in the Post-Master, and he is to have the Custody of the Officers, and the Office; and he is like the Marshal of the K. B. or Fleet Prison, who are intrusted with the Care of the Prison; 4 Co. 34. And if their Prisoners are freed by any Insurrection, or Tumult of the People, they shall not be excused: So the Law intrusts a Sheriff with the Goods taken upon a *Fieri Fac'*; and he is to keep them for the Plaintiff, and must make him Satisfaction if lost; and there is no Difference between those Instances and this Case.

2^{dly}, the Subject pays a Reward for carrying Letters; and it is like the Case of a Host, who shall be chargeable when he has a Reward. 2 Cro. Gelly v. Clerk, 188. Hob. 18. And as to Just. Gould's Reason, that there is no Contract between the Parties, there needs none; and where the Subject intrusts any one with valuable Things, he must have a Remedy for them; which here, can be against none but the Post-Master: It was resolved not long since, that an Action would lie against the Master of a Ship, for Things stole out of the Ship, because the Master is intrusted with the Care of them; and yet as the Post-Master has no Advantage of the Profits of the Office, but has his Salary from the King; so the Master of a Ship is paid by the Owners.

3^{dly}, The same Circumstances concur in this Case to make the Defendant chargeable, as in the other Cases of a Carrier, or a Master of a Ship, &c. the Reason which is given in the Civil Law, for making a Carrier chargeable, and upon which our Law no Doubt was founded, is because a Carrier may be in Correspondence with those that rob him; and the like Reason may be given here. As to the Objection, that a Carrier is chargeable because he may sue the Hundred, it is not good; for this Action lay against him before the Statute of *Winton*; and if he loses Goods out of his Warehouse, this Action will lie against him; yet in that Case he cannot sue the Hundred. If a Smith

upon the Road refuse to take my Horse, I shall have an Action upon the Case against him. *Kelway* 50. And here the Post-Master is obliged to take in such Things as are within the Statute; and these Bills are proper to be sent by the Post; for it appears by the Act, which limits what shall be carried, that other Things than Letters may be carried; and the Act seems to permit any Thing that is light of Carriage to be carried; and tho' these Bills are Things, created since the Act of 12 Car. 2. and so could not be taken Notice of in that Act, yet they are within the same Reason as the Things limited in the Act.

4^{thly}, The Post-Master here accepts the Letters under the same Condition, for safe Keeping; as in *Southcote's* Case, in the 4 Rep. 83. *b.* *Southcote* lent the Defendant his Goods, (*Safement Garder*) and they being stole from him, *Southcote* recovered in Detinue for them; it is granted that those, that were Post-Masters before the Act, were liable, and received such Letters and Parcels under such Condition of *Safement Garder*; and since it is not apparent the Act makes any Difference, it would be very hard to bar the Subject of his Action, when the Act has barred him of his Choice; for now he is confined to one Post-Master, whereas before he might chuse out of several.

5^{thly}, If a Deputy is guilty of Misfeasance, an Action will lie against him; but for the Nonfeasance or Negligence of a Deputy, the Superior is punishable; and in this Case, if any Misfeasance could be proved upon any particular Deputy, as the taking out of the Bills by him, he should have been punishable; and if a Deputy does any Act, which if done by a Superior would be a Forfeiture of his Office, such Act by a Deputy will have the same Effect. As to Mr. Justice *Powis's* Argument, who makes the Post-Master General a Servant with the Inferior Officers, I think otherwise; because tho' they are not under his Pay, yet they are under his Direction, and so are his Servants. Besides in other Particulars, it appears by the Act it self, that the Post-Master General shall be accountable for the Act of his Inferior, viz. the Clause relating to the

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providing

providing of Horses; in that Case if a Deputy at York refuse Horses, it is the Post-Master General shall incur the Forfeiture.

And a Writ of Error was brought and allowed on these Reasons of Holt Ch. Just. Sed quare quid inde venit.

In Domo Procerum.

Inter Ranger and Ashmead.

Copyholder bound to Repairs, the Lord cuts his Timber.

(3.) **A** Copyholder for Life of a House and Land, that by the Custom of the Manor may fell Timber for Repairs of the Copyhold Tenement, brings an Action of Trespass against the Servant of the Lord who entred by the Lord's Command, and cut Timber upon the Lands of the Copyholder, by which the Copyholder had not sufficient to repair the Copyhold Tenement; adjudged in B. R. by all the Court, That the Copyholder might have this Action; which Judgment was afterwards affirmed in the Exchequer-Chamber by all the Judges in England; and now reversed in the House of Lords, Eleven against Ten: *Vide 13 Rep. 67. Heydon and Smith S. C. Godbolt 172.*

Hec Misera Servitus! ubi Jus est Vagum.

Trin.

Trin. Term, 1702.

1 Anne Regine in B.R.

Matchel and Clerk

(1.) **I**N Error out of C.B. the Case upon the special Verdict was thus: Tenant in Tail covenants to stand feisd to the Use of himself for Life, Remainder to divers other Persons; afterwards he suffers a Recovery to other Uses; the Question was, if this Recovery was a good Recovery? If by the Covenant to stand feisd, he made any Alteration in the Estate-tail, then the Recovery could not be good; for there was a wrong Tenant to the *Præcipe*; if by the Covenant to stand feised, there was not any Alteration, then it was good: But all the Court held, that by the Covenant to stand feised there was no Alteration, and so the Recovery good. *Holt Cap. Just.* delivered the Opinion of the Court, but only his own Reasons, but the rest of the Judges agreed with him.

It has been a Question, if Tenant in Tail makes a Grant with Livery, Bargain and Sale, Lease or Release, it gives the Grantee, Bargainee, &c. any greater Estate than for Life of Tenant in Tail; but it has been held, that it creates a base Fee in such Grantee, &c. which is against the Opinion of *Litt. sect. 649, 650.* and the Reasons for it have been these:

1st, Because Tenant in Tail has more than an Estate for Life; he has the Inheritance in him, as appears by *Co. Lit. fo. 18. a.* If a Gift in Tail be made to a Villain, and the Lord enter, the Lord has a Fee-simple qualified, which

Tenant in Tail stands feised to Uses, &c. S.C. *Forst.* 19. 2 *Salk.* 619.

which could not be, if the Villain, as Tenant in Tail, had not as great an Estate in him.

2^{dly}, He has the whole Estate in him, therefore these Sort of Conveyances are incidents to it.

3^{dly}, It is no Prejudice to the Heir in Tail, nor against the Statute *de donis*; the putting the Issue to a Formedon is no Breach of the Statute *de donis*; so it does not put him to an Entry. 10 Co. 96. *Seymour's Case*; and 3 Co. 84. the Case of Fines: Such Bargainee has a descendible Estate, and his Wife shall be endowed of such Estate. *Litt.* says, the Estate of such Releasee or Bargainee is determined by the Death of Tenant in Tail; but by these Opinions 'tis not determined till the Issue enter; the Issue is not barred of his *Jus recuperandi* but till he uses that, the other has a good Estate; and so *Winch's Rep.* 5. *Bridgman* 92. The Case of Exchange in *Co. Lit.* 5. If Tenant in Tail in Exchange give a Fee-simple, it is good till avoided by the Issue in Tail; and yet the Rule is, that both the Estates exchanged must be equal in Quality; which proves there may be a Fee-simple passed out of the Tenant in Tail, and good till avoided by the Issue: But notwithstanding all this, in this Case, the Covenant to stand seised does not alter the Estate-tail, and so the Recovery is good; because by this Covenant these Uses do not take Effect during the Life of Tenant in Tail, which they must do, if they make any Alteration in the Estate-tail; or at least there must be a Possibility of their taking Effect during his Life; but here they are not to vest till after his Death; and so signify nothing, because the Title of the Heir in Tail, which is paramount, vests immediately. But it may be said, That here he has made himself Tenant for Life, and by that the Estate-tail is altered during his Life: But to this I answer, That it has no Effect (thereon), but is absolutely void (as to that), it being only made to support the Remainders. And the Judgment in *C. B.* affirmed.

N. B. The Case in 1 *Sand.* 260. (and *Litt.* §. 612.) was denied to be Law in this Case, *per Holt Ch. Just.*

Hill. Term. 1702.

1 Annæ Reginae in B.R.

Jasper vers. Eadowes.

(1.) **T**RESPASS *Quare Clausum fregit*, and destroyed his Oats. Defendant confesseth the Trespass, which was committed by a Pigg; and pleads in Bar, that the Plaintiff distrained the Pigg for the Trespass, and him *imparcavit* & *detinuit*. The Plaintiff by Replication confesseth the Taking and impounding of the Pigg, but that it escaped without his Consent; the Defendant demurs.

Trespass;
A Distress &
escapes contra
the Distreiner's
Consent;
no Remedy
for Damage.

Justice Gold. That the Plea is naught, (not saying that *adhuc detinet*;) and the Replication good, (without saying that the Pigg escaped *sine defaultu* of the Plaintiff,) and that Judgment ought to be *pro Quer.*

The Plaintiff had his Election to bring his Action or distrain; and tho' he distrained, if the Distress had died, the right of the Action would have remained to the Plaintiff. *Dr. & Stud. ca. 27. Hob. 61.* And the Reason is, because the Distress is in the Nature of a Pledge, which may be pleaded in Bar, so long as it is in the Plaintiff's Possession, but being once destroyed (or eloined), without his Default, the Plaintiff's Action is revived. If the Pigg had been rescued in carrying to the Pound, he might pursue and retake it. *27 Aff. pl. 74.* And in such Case it would be in his Election to admit himself out of Possession or not. *2 Cro. 50.* If the Plaintiff had suffered the Pigg to escape by his own Consent, the Trespass had been discharged; but that should have been shewn in the Bar. And the Plaintiff says, it escaped *contra consensum*

G

& vo.

Et voluntatem: Besides the Bar is bad for not saying, *Et adhuc detinet*. *Scire Fac'* against the Bail, on a Judgment against the Principal, the Bail pleads the Defendant was in Custody; this Plea is bad, without saying he is still in Custody. *Rast. 171*. So it is regularly true, you must aver that which continues the Wrong. *12 H. 8. 2. 13 H. 8. 5*. The Replication is good to a common Intent; and if any Default was in the Plaintiff, it ought to have been shewn by the Defendant, who is to have the Advantage. *1 Leo. 18. 1 Vent. 54*. If the Defendant sued a Replevin, the Sheriff might return the special Matter, that the Pigg was dead, or taken away by the Defendant, or escaped. *Brook tit. Ret. 125. Dalton Ret. 124*. And therefore Judgment ought to be for the Plaintiff.

Justice Powis. At Common Law Distress is only a Gage, and no Satisfaction. *2 Cro. 148. Hob. 61*. But since the Statute of *W. 3.* it is a Satisfaction, as to Rent; but as to Trespass, the Common Law is not alter'd. And the Distress is so far a Gage, that he cannot do any Thing for the bettering the Distress: And that is the Reason, that if a Milch Cow is distrained, the Distrainer cannot milk her. *1 Roll 673*. which is of better Authority than *2 Cro. 148*. Nor can the Distrainer tie the Distress in the Pound; for he cannot meddle further than barely impounding it. It should seem reasonable that the Distrainer should have further Indulgence in a publick than in a private Pound. If Cattle distrained for Rent die in the Pound, he may take a new Distress. *Dyer 28. Hob. 61. 25 Ed. 3. 6*.

But I take it, that in this Case the Plea is good and the Replication bad.

For he does not say the Pigg escaped without his Default; and it may very well escape against his Will or Consent, and yet by his Default: For suppose, after the Pigg was impounded, the Plaintiff opens the Door of the Pound, and the Pigg slips out, this is against his Will, and yet by his Default.

To the Objection, That the Defendant in his Bar ought to have said *Et adhuc detinet*. *Answ.* The Plea is good to a common Intent; and I think better pleaded as it is: For

he sets forth the Truth, and it might be dangerous to say *Et adhuc Detinet*: For the Plaintiff might traverse it; and it is enough for the Defendant that the *Detinet* is intended by the Law; and that Judgment ought to be *pro Def*.

Justice Turton. The Plaintiff had his Choice of two Remedies, Distress or Trespass, and his Election of one is the Rejection of the other. *Levy per Distress* is a good Not. Bar to Debt for Rent; and for the same Reason a good Bar in Trespass. A Distress is no Satisfaction, but may be kept till Satisfaction; and it is the Plaintiff's Duty to keep the Distress. *First*, Because he had a Choice of his Pound. *Secondly*, He had an Interest in the Pound, tho' in another Man's Ground: For the Pound is his Pound, and he only can have a *parco fracto*, and not his Servant, or the Owner of the Soil. *Thirdly*, If the Plaintiff had distrained dead Goods, he must have put them in a Pound Covert, that they might be kept dry; otherwise if they were spoiled or abused he is to answer for them. *Co. Lit.* 47. 1 *Roll* 133. Whence it may be inferred it is at the Plaintiff's Peril to put the Distress in a safe Pound, and keep it in safe Custody. If the Defendant had taken away the Distress, a *parco fracto* would have lain against him; and that was his only Remedy, and not an Action of Trespass. It does not appear the Defendant ever got his Pigg again; and it is unreasonable he should suffer a double Punishment, since he made no Default, and the Plaintiff made his Election. Judgment ought to be *pro Def*.

Ch. Just. Holt. There was a Time when the Plaintiff could not have this Action, *i. e.* while he had the Distress in his Custody. The Defendant's Plea is a total Bar *ab origine*. If the Plaintiff will avoid this Bar, he must shew the special Matter, that will intitle him to revive his Action, and that he has not done. To the Objection, That he has not pleaded *Et adhuc Detinet*, I answer, That a Bar is good to a common Intent, and the Plaintiff ought to shew how the Distress was lost: For it must be presumed he can give the best Account of it; and perhaps he put it into a Pound that was out of Repair; but whether in a private, or a *publick*, or common Pound, it matters not; for the Law has

*Quare de
hoc, and if not
an Article of
the Leet, to
inquire if the
common
Pound was out
of Repair.*

has not appointed any such Thing as a *common Pound*. They are only by the Agreement of Lords and Tenants; and so are Haywards and Keepers of Pounds. The Distress is for the Benefit of the Distrainer; wherever he impounds the Pound is his, and he only can have the *parco fracto*; and therefore the keeping the Distress is at his Peril. In the Replication the Plaintiff ought to shew what became of the Distress: It might escape through his Neglect, tho' *contra voluntatem*. Had the Pigg died in the Pound Overt, the Act of God would have revived the Action. As to the Case of a Replevin, it is not enough that it be good to a common Intent: For the Rule is, that Replevin must be good to a certain Intent in general, but a Bar may be good to a common Intent.

So Judgment was *pro Def.*

Cutting vers. Wilkins.

*Error.
Several Counts,
one is ill; if
Damages are
intire 'tis ill
in toto.*

(2.) THE Plaintiff in the original Action counts upon a Note payable to him or Order, according to the Custom of Merchants; and further counts upon an *Assumpsit* for Monies received to his Use. Judgment by Default and several Damages; but an entire Judgment *quod recuperet dampna predicta*, whereupon Error was brought.

The Defendant in Error, to support the Judgment, insisted, that tho' the Action, according to the Custom of Merchants, does not lie in this Case, yet the Damages being several, and Judgment *quod recuperet dampna predicta*, it shall be taken as a several Judgment, and not joint.

And therefore if Judgment be reversed for the Damages given on the bad Count, yet it shall stand for the rest; and insisted on the Case of *Miles and Jacob*, *Hob. 6. Cro. Jac. 343. 1 Roll 77 or 771, 3.* And also the Case of *Reymer and Grimston*, *Moor 708.* which are exprefs in Point.

The Plaintiff in Error insisted, that the first Count was not good; for that there was no Consideration according to the Cases of *Clerk and Person*, and *Goddard v. Smith*, adjudged in this Court. *2 Salk. 456. Q. 6 Mod. 261.*

And as to the Point, tho' the Damages are several, the Judgment is entire, and must be reversed in the whole; and denied the Authority of *Miles* and *Jacob*, in *Hob. 6.* Note. which has been contradicted by many Judgments since; as *Cro. Jac. 424. Loyd and Pearce. 1 Roll 775, 4. 1 Keb. 232. Stiles 121, 125. 1 Vent 27, 39. Gregory v. Eads.* And the Plaintiff ought to have remitted his Damages, on the insufficient Count, according to 2 *Saunders 379, 380.*

The Court were of Opinion to reverse the Judgment *in toto*; and denied the Authority of *Miles* and *Jacob*, in *Hob. 6.* For the Judgment being entire, cannot be reversed in Part. And Judgment was reversed *Nisi.*

Pengelly Serj. pro Quer' in Error.
Welld Serj. pro Def'.

The Queen vers. Whistler.

(3.) CONviction before a Justice of Peace on the Stat. 3, 4 *W. & M. c. 10.* Setting forth, that the Defendant was *illicite & injuste auxiliars* to one *Rolf*, in killing five Deer, by perswading and exciting the said *Rolf* to hunt and kill the same, by lending a Dog to hunt and kill the same, and a Horse to bring them away, *contra formam statuti.*

Aiders, Accessory, Felons within the Statute against Deer-stealers. See *Farely 129. and 2 Salk. 542.* this Case, but not so fully as here.

The Question was, whether the Defendant was an Aider and Abetter therein, within the Intent and Meaning of the Statute. And if so be the Words *Aiding* and *Abetting* were not in the Statute, whether the Defendant would not be a Principal.

Note: Where an Offence is made Felony by Statute, Accessories are intended tho' not named.

Adjudged by *Powis, Gold* and *Powell*, to be guilty within the Statute, against the Opinion of *Holt Ch. Just.*

Gold held Aiders and Assisters therein to be the same as Aiders and Assisters thereto; and from the Preamble of the Act inferred, that the Defendant was within the Meaning of the Act; and that Aiding and Assisting ought to be taken in the largest Sense, being a remedial Statute.

Obj. That Aiding and Assisting (therein) must be in the Fact. Aiding before the Fact is inciting, but not assisting, &c.

H

Ans.

Ans. Aiding may be before; as in 12 Rep. 81. He that gives his Consent to a Trespass is a Principal, and so an Aider in the Fact. So he that incites, is aiding in making false Money, is guilty of High Treason; and *particeps criminis* before the Fact. But if the Word *Aiding* was out, yet he that aids before the Fact is a Principal, being only a Trespass. 13 H. 7. 12. Upon the Statute 23 Ed. 1. whereby it is provided against Trespassers in Parks, that if any be thereof attainted, great Amends shall be awarded; and he shall have three Years Imprisonment, &c. Here Commanders are not mentioned, but they are adjudg'd Trespassers.

Powis. I think all Persons aiding and assisting, tho' not present, yet they are within the Statute. By 3 Ed. 1. c. 20. *De malefactoribus in parcis*, it was enacted, that the Party should make Amends, suffer Fine and Imprisonment, and find Sureties; yet I do not take Aiders were within that Statute. But the Words *Aiders and Assisters* are in this Statute. But if those Words were not there, the Defendant would not be in the Statute, because it is a penal Statute, and not to be extended further than an easy Interpretation will bear: Yet I think it shall be extended further than to those present; for if a Man perswades to kill, and lends Dogs and Horses, and they are used accordingly, he is aiding therein. 2 Inst. 182. says, the Word *Aider* may comprehend all Persons encouraging, tho' not present. *Cro. Car.* 473. Case upon the Statute 39 Eliz. which takes away Clergy from those that break a House, and steal above the Value of 5s. One gets by a Ladder into the House, and the other only stands upon the Ladder, but does not go in, it is resolved, that Clergy is not taken from him that did not enter the House: But that comes not to this Case, the Word *Aiders* not being in that Statute. There are also several Statutes wherein Aiders are mentioned, and yet not construed to extend to those that are absent; but they are answered by distinguishing twixt Acts relating to Felony, and Acts that relate to other Crimes. Those that relate to Felony are taken strictly in Favour of Life; and also because it would otherwise confound the Species of Crimes, and make Accessories and Principals the same. For that an Accessory may

may be in Felony, but in Trespafs all are Principals. The Preamble of this Act makes it appear to be a remedial Act; and none of the former Statutes having reached to this Case, therefore the very Words *Aiding and Assisting* were put in to reach the very Mischief mentioned in the Preamble.

Powel held it to be a good Conviction. An Objection has been made that this is a penal Law, and the Penalty is not annexed to the Offence, but to the Person of the Offender, and their Aiders and Abettors therein; and thence it was urged, that he that is not present, but incites others to do the Fact, is not within the Words of the Statute; but if it had been annexed to the Offence, it would have extended to all that were Abettors thereto, as well as therein. *Answ.* I shall not urge it from the Preamble, it being a penal Statute, and not to be expounded by Equity; but I think he is within the Letter of the Statute, he is an Aider therein as much as if he were present at the Fact. Where a Felony is made by Act of Parliament, there will be Accessories both before and after the Fact. *Westm. 2. ca. 34.*

If a Man commit a Rape, he shall have Judgment of Life and Member; nothing can be more penal than that, yet no Body doubts but Aiders are Ravishers; and a Woman has been for that Reason adjudged a Ravisher. 3 H. 7. c. 2. The Statute *de malefactoribus in parcis* is a penal Law. The Words are Trespassers in Parks; and the first Question that arose on that Statute was in 33 Ed. 1. fo. 11. And there it was adjudged to be intended only of Misdemeanors in Hunting, and not taking away Cattle. Then came another Case, 5 H. 5. fo. 1. Where the Jury found that the Defendant did break the Park in order to hunt, but he killed no Deer; and yet adjudged he was a Hunter within that Statute. 13 H. 7. 12, 13. Another Action was brought on that Statute, and it was adjudged, that requesting another to hunt was hunting himself, tho' that was a penal Law. In Felony, the Procurer would have been an Accessory, and why not in a Misdemeanor. The Case of *Evans* and *Finch* seems only to go on this Distinction, where Clergy is taken from the Offence, and where from the Party offending.

offending. For where it is taken from the Offence, it is taken from all that aid thereto; but if taken from the Person entring into the House, that Case says, it shall not be taken from the Aider or Assister. But that was a Case in Favour of Life, and I know not whether it will be a Case to rule others by.

Holt Ch. Just. differed from the rest. A penal Statute is not to be expounded by Equity; but you must adhere to the Words, tho' the Fact may be within the Reason of the Statute, and of as heinous a Nature as that intended to be punished.

That this is a penal Statute is without all Question, for there is a Penalty. And the Trial is put out of the common Way by *Magna Charta*, by the *Pares* or Peers; and this being subjected to a private Jurisdiction, before a private Justice in his House, or Chamber, we ought to adhere strictly to the Letter.

Since then the Preamble is not sufficient to bring this Man within the Penalty, there are no Words in the Statute that can do it. For tho' in the Preamble of the Statute there is a Mischief recited, which is Combining and Confederating, yet there are no Words in the Statute which inflict a Penalty on Combining and Confederating.

Then consider the Words of the Statute, and they are Aiders, Abettors and Assisters therein; in the Fact, not Aiders, &c. thereto, but in the Fact. A Man lends his Horse and Dogs to hunt, he is an Aider thereto, but he does not assist in it. If the Law takes away Clergy from him that shall commit Murder, &c. Aiders, Abettors and Assisters, yet you will not take it from Accessories. It is observed, that this is of an inferior Nature to Felony, and is only a Trespass: It is true, if the Statute had inflicted the Penalty, under the Name of a Trespass in Parks only, then the Commanders and Abettors before, as well as those present, would have been comprehended; because they are by Law Trespassers. And the Statute *de malefactoribus in parcis* makes it penal; not because it is done in a special Manner, but because it is a Trespass in the Park. But here the Statute sets forth the Offence in particular Circumstances;

stances; and the Penalty is inflicted, not as it is a Trespass at large, but as it is so distinguished. As to the Case of *Evans* and *Finch*; that the Statute takes away Clergy from him that breaks the House, and takes away to the Value of 5 s. Two go together, one breaks the House, and the other stands upon the Watch, they are both Principals in this; but Clergy is taken away, not on Account of the Felony only, but on Account of the Felony with these Circumstances of entring and taking away. But if Clergy be taken away from Burglary, it is not only taken from him that breaks, but from him that stands by; and it is taken away from all that are guilty of that Crime that is contained in the Burglary. But if Clergy is taken away from him that robbes on the Highway, and assaults in such a Manner, he that stands by shall not lose his Clergy. If an Act of Parliament makes that a Felony, which was before but a Trespass, the Species and Nature of the Fact is changed: Therefore the Abettors must be Felons because they can't be Trespassers. And so if an Act of Parliament should make that Treason, which before was only Felony, those who before were only Accessaries would now become Principals; because the Species of the Crime is changed: But this Act of Parliament does not alter the Nature of the Crime, but only inflicts a higher Penalty; and therefore ought to be taken strictly in those Circumstances that are prescribed: Therefore I cannot agree to extend it beyond the Letter, and do think it not to be a good Conviction. But Judgment was entered according to the Opinion of the other three Justices.

Trin.

Trin. Term. 1703.

2 *Anna Reginae in B. R.*

Johnson vers. Shippin.

Prohibition to
the Admiralty.

(1.) **P**rohibition was prayed to the Admiralty for libelling against a Ship, upon Suggestion, that the Contract was made at Land, viz. at Boston in New England; but it appeared the Ship was so damaged by a Storm, that the Master was forced to Hypothecate Part of her for Necessaries taken up at Boston aforesaid, to supply the Damage done by the Strefs of Weather; whereupon a Prohibition was refused; and resolved, that when a Ship in a Voyage is in Distress, this Court will allow the Admiralty Jurisdiction in Case of an Hypothecation; because this Court cannot give the Party so proper a Remedy as the Maritime Law can. Besides, the original Cause was by Reason of the Distress; and where shall a Master hypothecate his Ship, unless he does it upon Land: For 'tis absurd to suppose him to meet a Ship on the Sea able to supply him with Necessaries; and what Security can the Master be supposed to give, unless he hypothecates the Ship. For tho' the Maritime Law does not allow the Master to sell her, yet it allows him to mortgage her for the Reasons and Occasions aforesaid, tho' he is no Owner of her, which our Law is absolutely a Stranger to; so that should the Admiralty be prohibited, their Law, quoad Hypothecation, falls to the Ground, which the Court said would be a great Inconveniency.

See the following Case, viz.

Mich. Term. 1704.

3 *Anna* Regina in B. R.

Osman vers. *Wells & al.*

(1.) **M**R. *Whitaker* moved for a Prohibition to the Admiralty, for libelling against the Body of a Ship in the River *Thames* for Mariners Wages, and that had never been *extra corpus Comitatus*. The Suggestion was, that a Ship-wright was in Treaty with the Captain for the Sale of the Ship; and as a Trial of a Ship, 'tis usual for the Captain to go on board, and to bring Mariners with him, and to imploy them about the Ship, and then to lanch her, &c. Afterwards they disagreed before the Property was altered; and the Workmanship was removed from the Ship, and the Hull returned to the Ship-wright. Now the Question in this Case was, if 'twas within the Reason and Rule of Mariners Wages, the Ship not being benefitted by the Mens Work; and the Court at first thought it somewhat difficult, and ordered it to be spoke to again this Term; and then Mr. Common Serjeant *Dee* argued that a Prohibition ought not to go; for that the Libel was directly for Seamen's Wages, and seven or eight of them joined in the Suit; and altho' the Voyage was prevented, by the Disagreement between the Ship-wright and the Master, yet upon Account of the intended Voyage; the Seamen came in as Mariners, in Order to a Voyage, and the Disagreement between the Parties shall not prejudice the Seamen; for they shall not be driven to their Action at Law, where they must severally sue upon the Contract.

Prohibition to the Admiralty. Vide *Jobson v. Shippin* ante, and the Case of *Hyde and Partridge* post, in *Pafib.* 4 *Anna* Number 4.

Mr. *Ayres*

Mr. Ayres said, If a Prohibition did not go, it would be of very ill Consequence to Builders; but the Court answered; that when the Builder credited the Master with the Ship, he ought to take a Bond to indemnify it against the Mariners Wages. Then he objected, that there ought to have been a Voyage to be a Foundation for the Admiralty's Jurisdiction; because the Libel says, for Work done at Sea. He cited a Case in 3 Keb. 552. Where a Prohibition was granted for Libelling against a Ship, for Tackle bought in the Thames, supposing in the Suggestion *infra corpus Comitatus*. But the Court held that Prohibition to be upon the Contract, and not like this Case. Then he cited a Case in 3 Levinz 60. where a Prohibition was prayed to stay a Suit in the Admiralty for Mariners Wages; upon Suggestion, that the Suit was founded upon a Charter-party made at Land, and not upon the high Sea; but the Prohibition was denied, the Suit being for Mariners Wages, which accrued due for their Labour done at Sea, and the Charter and Contract made upon Land was only to ascertain them: Now, tho' in this Case there was no Work done at Sea, yet in as much as upon the Face of the Libel it appeared the Suit was for Seamens Wages, and for the Indulgence due to Mariners, all the Court were of Opinion, the Admiralty had a Jurisdiction, and so denied a Prohibition; which is a stronger Case than the Case in *Levinz* above cited.

Trevannian's Case.

An Attorney grants a Replevin of his own Goods, 'tis ill.

(2.) **M**Otion by Mr. Ayres for Leave to file an Information against one *Trevannian*, an Attorney, for assuming to himself an Authority of granting Replevins, whereby he, in his one Case, granted a Replevin for his own Goods. This Mr. Ayres urged to be a great Misdemeanor; and that to usurp an Authority; as to hold a Leet, and summons People in, and the like, is punishable by Information, &c. But the Court denied the Motion at first, because there was another Remedy, *viz.* by a *Parco fracto*, this being a *Pound-breach*; but afterwards

terwards they ordered him to shew Cause, &c. Note; As no Under-Sheriff ought to practise as a common Attorney, so no Attorney ought to practise as Under-Sheriff in granting Replevins, &c.

Morris against Spencer.

(3.) UPON a Writ of Error, the Exception taken to the Bail was within twenty Days, but the Rule was served after the twenty Days past, which the Plaintiff in Error thought was irregular, and so did not put in better Bail; whereupon the Defendant in Error took out Execution, which on a solemn Debate the Court held to be irregular; and ordered this Case, with the following Matter, to be the standing Rule for the Practice. *First*, That Exception to the Bail in a Writ of Error must be taken within twenty Days. *2dly*, Before Execution can go out for Want of better Bail, the Rule ought to be served. *3dly*, The not serving the Rule within twenty Days is not material nor inconvenient; because it is only in Delay of the Plaintiff in Error himself.

Rules about
Bail in Writs
of Error,

Queen vers. Sir Jacob Banks.

(4.) SIR Jacob Banks was indicted for an Assault upon Mr. Calpepper, which was removed hither by *Certiorari*: The Prosecutor not carrying it down next Assizes, the Defendant the same Assizes carries it down and tried it, and the Defendant was found Not guilty. Mr. Nott moved to set aside the Trial, there not having been any Laches in the Prosecutor. And Powell said, the trying it the very next Assizes was too soon; and there could not be any Laches in the Queen, nor any Trial carried down by *Proviso* against her: But the *Quere* was, If the Attorney General by his Warrant, giving Consent to a Trial at *Nisi prius*, should not imply his Consent throughout. But Holt Ch. Just. said, Mr. Attorney's Warrant was only a general Warrant to

New Trial,
where Indict-
ment tried by
Proviso of the
Defendant.
2 Salk. 652.
6 Mod. 245.

K

try

try it at *Nisi Prius*, and was more of Course, than upon inquiry into the Merits of the Cause. And Mr. Attorney said, he was no otherwise concerned than to give the same general Warrant he did in all Cases. And Holt said, 'twas his Opinion, that where a Prosecutor removes an Indictment, 'tis very hard the Defendant should *nolens volens* carry it down the next Assizes and try it, when perhaps the Prosecutor cannot be ready with his Evidences. For suppose 'twas for Treason or Felony, this would put the Queen in a worse Case than any Subject. Powell, Powis and Gold agreed to what Holt said; and that none of the Precedents, quoted by the Solicitor General, who was Counsel for the Defendant, were above five Years standing, and those passed *sub silentio*; so all were of Opinion, that a new Trial ought to be: And Holt said, that no Criminal can carry down a *Venire* by *Proviso*; but he ought properly to move the Court for Relief, in case a Process hangs over his Head; that the Court may see if there be any Laches or Neglect in the Prosecutor or not; and such Motion they should never grant upon the first Instance or Hearing, but give Time to shew Cause. And so they set aside the Trial.

See 1 Keble 215. 2 Leon. 110.

Anonymous.

In Debt on
Bond, Pay-
ment of Part
not pleadable.

(5.) DEBT upon a Bond for Payment of 500 L. The Defendant pleads Payment of 225 L. Part of the said 500 L. to this the Plaintiff demurs; and *per totam Curiam* adjudged to be a Discontinuance; because he had only answered to Part of the Demand.

Clerk vers. Withers, Sheriff, &c.

The Sheriff
that begins an
Execution
shall end it.
Compare this
with 1 Salk.
322. and
6 Mod. 290.

(6.) THE Case was this: A recovers 300 L. as Administrator of X S. against the Plaintiff Clerk, and thereupon sues out a *Fi. fa.* to the Sheriff of Middlesex, who levied Goods sufficient; A before the Return of the Writ

Writ dies, the Goods remained in the Sheriffs Hands *pro defectu Emptorum*: The Sheriffs went out of their Office, and new ones were made. Clerk brings a *Scire facias* against one of the old Sheriffs in the Common Pleas, to have Restitution of his Goods, and Judgment was there given against him; whereupon he brought a Writ of Error in the Queen's Bench. Gold said, Judgment ought to be affirmed, 1st, Because Mr. Clerk is discharged of the Debt, for he may plead, levied, &c. 1 *Lutw.* 588. 3 *Cro.* 237. *Ibid.* 208, 209, 390. 36 *Car.* 2. *Rot.* 540. 'tis plain, he said, the Sheriff may sell the Goods, tho' he be out of his Office, as 2 *Cro.* 73. 1 *Jones* 388. For so soon as the Sheriff has seised, he has such a Property, as that he may maintain Trespass or Trover against the Owner himself. 3 *Cro.* 639. And after a *Ff fa'*, or *Elegit* executed, if the Plaintiff dies, the Administrator, or in this Case the Administrator *de bonis non* shall have the Goods, or an Action against the Sheriff: And 'tis not like an Extent, where a *Liberate* must go. *Powis* agreed with Gold; and so did *Powell*, and said the *Scire Facias* did not lie; because the Execution was in Part executed, by levying the Goods in the Life of the Administrator; and if one Sheriff levies, the succeeding Sheriff shall not go on with it, but the old Sheriff: For after once Goods are levied, 'tis not a *Superfedeas*, but only a Writ of Error can stop the Completion of the Execution: Besides here is no further Award of the Court; for a *Venditioni Exponas* is no Award of the Court. Then if it be asked, what shall become of the Money when 'tis brought into Court? It shall be as Money recovered in the Intestate's Life-time, and shall go to such Person as the Court shall be apprized has Right to it, by Administration *de bonis non*, or otherwise.

Holt Ch. Just. was of the same Opinion. For no *Scire Facias* lies after Seizure; nothing else is to be done, by the Sheriff to the Plaintiff, but to bring the Money into Court at the Return of the Writ; and this he may do, notwithstanding the Plaintiff's Death, if the Goods were seised in his Life-time. Then if after Seizure the Sheriff is out of his Office, yet he is bound to make Sale of them; and to say

See 2 Cro.
515. 1 Sid.
407, 99.
1 Cro. 166.
2 Roll Ab. 491.
2 Vent, 439.
Dyer 186.
Noy 73.
1 Sid. 29.

say they are in his Hands for Want of Buyers, is not a Discharge but an Excuse only: For he has an Authority to sell without a *Venditioni Exponas*, which is to compel him to do it. And the proper Remedy is by *Distringas* to the new Sheriff, to distrain the old one to sell; (34 H. 6. 36. is the very Precedent,) and shall return Issues upon him if he does not. Now if a Sheriff had an Authority, without a *Venditioni Exponas*, 'tis unreasonable to force him by a compulsory Writ to do it. Another Sort of *Distringas* is in *Rastal's Ent.* 164. If a Sheriff return Goods to a Value, and then they are lost or rescued, he is bound to make them good to the Value returned, and Debt lies against him, as in 2 *Saunders* 343. Before Sale the Defendant is actually discharged; for the Goods are taken in lieu of the Debt, and the Plaintiff has no Remedy but against the Sheriff.

Where a *Scire facias* or Extent is sued out, and before Inquisition taken the Plaintiff dies, there, upon the Return of the Extent, the Administrator *de bonis non* shall not have a *Liberate*; but otherwise if he dies after Inquisition taken. Whereupon Judgment in the Common Pleas was affirmed.

Cragger vers. Glover.

A Prisoner discharged on the late Statute, and after arrested for a Debt of above 100*l.* due before the Discharge, must find special Bail. See 6 *Mod.* 22, 301. *Salk.* 345 and 521.

(7.) **H**OLT delivered the Opinion of this Court, and also of the Judges of the Common Pleas, whom he said he had consulted in the following Case, which was this; J. S. is in Gaol for 20*l.* and no more, and is discharged by the new Act of Parliament, 2 *Annæ*. Then after such Discharge he is arrested for a Debt of above 100*l.* due before the Discharge; and the Question was, if he should be discharged again without special Bail? he said it seemed doubtful, because of the Words in the Statute, *viz. For any Debt whatsoever.*

But then the *Proviso* is to be considered, which is, *Provided that no Man shall be discharged by Virtue of this Act, if he stand charged and be indebted above 100*l.** Now 'tis objected, that this shall be applied to the first Discharge only: But he said, it ought to be applied to the second Discharge

Discharge as well as to the first; for he, that is a second Time discharged, is as much discharged by Virtue of this Act, as he that is discharged the first Time. Besides, 'twas the Intent of the Act, that no Man shall be discharged that owed above 100 l. Nor can the Discharge of the other Debts be a Discharge in this wherewith he was never charged.

Hill. Term. 1704.

3 Annæ Reginae in B.R.

Green Executor of vers. Crane.

(1.) **A**ction on the Case brought by an Executor, upon several Promises laid to have been made to the Testator. The Defendant pleads the Statute of Limitations; upon which Issue was joined: It appeared upon Evidence, that the Testator had been dead seven Years before the Action was brought: But the Executor gave in Evidence, a Promise made to himself within one Year, which was the Point saved at the Trial: A Verdict was given for the Plaintiff; & *per tot' Curiam*; although the owning of the Debt is a Continuation of it, and takes away all Presumption of its having ever been paid, and consequently brings it out of the Statute, yet this Verdict did not maintain the Issue; and was set aside, Because the Promise, being made to the Executor, could not be made to the Testator *infra sex annos.*

Promise laid as made to the Testator, who had been dead seven Years; the Defendant pleads *non Assumpsit infra sex annos*; the Plaintiff proves a Promise to himself within four Years; this does not maintain the Issue.

Blackmore vers. Titherly.

Statute of Li-
mitations
pleaded argu-
mentatively.
See new Mat-
ter in this
Case not in
2 Salk. 423.
or 6 Mod. 240.

(2.) **A**ction of Assault and Battery; the Defendant pleads no Assault, &c. *infra sex annos*, (which by the Statute is limited to four Years.) The Plaintiff demurs; the Defendant joins in Demurrer; and *per tot' Curiam*, Judgment for the Plaintiff. For tho' this was an argumentative Plea, *viz.* That what was not done within six Years could not be done within four Years; yet suppose they had joined Issue, and a Verdict had been, that it was within five Years, the Court could not have given Judgment for the Plaintiff: And should such argumentative Pleas be allowed or countenanced, they would inveigle the Court in their Judgments; and therefore 'twas resolved, that the Plea of the Statute of Limitations should be precise and direct; for the Court said, there was no such Statute as to bar an Action of Assault and Battery not done *infra sex annos*; but the Statute is express *infra quatuor annos*, &c. Whereupon Judgment was given *ut supra*.

Wangford Legatee of Shelly vers. Wangford, Debtor and Executor to Shelly.

Obligee
makes the
Obligor Exe-
cutor, who
never proves
the Will;
Q. if a Re-
lease of the
Debt.
See the Case
in 1 Salk. 299.
and 3 Salk.
162. but not
so fully as
here.

(3.) **E**rror on a Judgment given in the Common Pleas; and the Case was in short this: The Obligee makes his Obligor Executor, who accepts of the Executorship, by his administering, but dies before Probate; and if this is a Release of the Debt was the Question. Judgment in the Common Pleas that it was; upon which Error was brought here, where the Judges *seriatim* gave their Opinions, That the Judgment in the Common Pleas was well given.

And first, Gold said, It must be agreed, that if the Executor of the Obligee had proved the Will, it would have been a Release: And urged, that the Non-Probate would

would not alter the Case; and he relied much upon these Cases, which he said were strong in Point. 20 Ed. 4. 17. a. 21 Ed. 4. Ca. 4. fo. 3. and Plowd. Com. 184.

Again, he said, He is Executor, to all Intents and Purposes, before Probate, save only to the prosecuting of Actions; and by his once taking upon him the Administration he has so bound himself, that he can never after refuse. 1 Mod. Rep. 213. 5 Rep. Middleton's Case. But if an Obligor Executor would refuse before the Ordinary to accept of the Executorship, without having before meddled, then he held, the Act of the Testator would not (*volens volens*) amount to a Release.

Powis said, An Executor has before Probate a very large and ample Power; and cited Middleton's Case, in the 5 Rep. For before Probate an Executor may release a Debt, which an Administrator cannot do; for the Executor commences by an Act temporal, originally by the Will, but an Administrator commences from the Letters of Administration; and so the Diversity, Plowd. Com. 280. 1 Roll's Abridg. 917. 36 H. 6. 7. 1 Mod. Rep. 213. Dyer 367. Hist. Rep. 30 & 31. Cro. Jac. 614. 1 Vent. 303. is reconciled.

If an Executor refuses to accept the Executorship, and is a Debtor, the Administrator may sue him; for he said, it was no Release of the Debt, contrary to the sudden Opinion of Twissden, in 1 Vent. 303. But he took a Difference between an actual Refusal, and not meddling with the Executorship for a Time: For if A. makes a Deed to the Use of B. 'tis A's Deed till B. refuses. 3 Rep. 26.

Powell first of all cited the Case in 21 Ed. 4. 3. and said, Abundance of Cases agree, that if the Debtor makes the Debtor Executor, who proves the Will, the Debt is for ever gone, because it is the very Act of the Testator himself; and therefore if it is only suspended, it being his Act, 'tis for ever gone. Now if the proving the Will is the only Cause, then he said, 'tis very strange none of the Books should take Notice of it. But the Reason given in them is, That a personal Action, once suspended, is for ever gone. But 'tis plain the Right of Action is in him before Probate, and therefore he may release: nay, he may bring

5 Rep. 28.
Note: He
must declare
with a Pro-
fert, &c.

bring an Action, tho' he cannot go on with it, till he has obtain'd the Probate under Seal to produce in Court. 1 Roll's Abridg. 917. Hutt. 30.

Vid. Palmer
Rep. 156.
Yelv. 160. an
express Case
in Point.

If the Ordinary grants Letters of Administration to the Obligor, it will suspend the Action, but nothing further; because 'tis not the Act of the Obligee himself. If an Executor dies before Probate, his Executor shall not be Executor to the first Testator. And he thought the Cases in *Dyer* 372. 1 *Leo.* 275. and *Plowd. Com.* 290. were the first that allowed of this; and he said, they were rather in Compliance with the Spiritual Court than lawful: For an Executor is an Authority given by the first Testator, and then what Authority have the Spiritual Court, or the first Executor, to make an Executor to the first Testator. Now as to the Matter of the Release, he said, it could not operate as such; for then it would not be Assets, but rather as a Legacy; and yet it would not be Assets to Legacies, except Part of it was especially appointed to be paid away, for then it shews the Intent. 1 *Roll Abr.* 920, 921. For a Will cannot be said properly to be a Release, but a Gift, and so must be liable to Debts. If the Obligor makes the Obligee Executor, who accepts it; now if there is Assets, he may retain; if there is none, he may sue the Heir, and so no suspension of his Debt; for if his Debt is extinguished, 'tis upon Presumption of his being satisfied by retaining. *Plowd. Com.* 185.

Lord Ch. J. Holt said, before he gave his Reasons for affirming the Judgment, he would first give Answers to three Objections started at the Bar. The first was, when a Will is made, and the Executor dies before Probate, the Spiritual Court grant Administration *cum Testamento annexo*, without taking any Notice of the Administration by the Executor. The second Objection was, That 'tis the Foundation for granting Administration to the next of Kin, that the Executor died *ante omnes Testamenti super se assumpsit*. The third Objection was, That such Executor, making his Executor, he cannot be Executor to the first Testator; but Administration must be granted *cum Testament' annex'*. And as to the first Objection, he said, the Spiritual Court could not take No-

tice

tice of what an Executor did, tho' all his Acts were valid before Probate. As to the second, That he died *ante onus Testamenti super se assumptu*; he said, that must be taken in a restrained Sense, *viz. ante Onus*; &c. taken upon him in their Court. And as to the third Objection, That an Executor dying before Probate, making his Executor, that he shall not be Executor to the first Testator, is, because no Man can prove the Will of another, who is not named Executor, &c. in the Will. *Cro. Jac. 614.*

His first Reason for affirming the Judgment was, That by the making him Executor he is intitled to receive and pay Money due before Probate; and being bound to receive and pay, he cannot pay himself, and so it operates as an Extinguishment; but this Rule is subject to several Limitations; as if the Obligor makes the Obligee Executor, for he is not bound to pay unless he has Assets, and then he may retain for his own Debt. *11 H. 4. 83. Cro. Car. 372. Hill. 24 & 25 Car. 2. Cock and Cross.* A second Limitation; Suppose the Obligor takes Administration, he has as much Right to receive as the Executor; But then the one is the Act of the Creditor, the other of the Ordinary, which is but a naked Authority without any Interest; as in the *8 Rep. Sir John Needam's Case.* A third Limitation; If the Executor of the Obligee take the Obligor to Husband, this is no Extinguishment. *Co. Lit. 264.* But if the Obligee takes the Obligor to Husband, it is; because 'tis in Vain for the Husband to pay Money to his Wife. But when the Husband pays Money to the Wife Executrix, there it shall not be the Husband's Money, if she dies, but the Administrator's *de bonis non.* Another Reason is, because 'tis Assets; for it amounts to a Payment, and enures as a Release thereupon, contrary to *Powell*, and is as much as if he had received so much Money, and therefore is Assets in his Hands. Another Reason is, By his accepting the Administration he becomes a compleat Executor, tho' he dies before Probate, and all the Goods of the Testator are, by Act in Law, vested in his Possession, for which he may bring Trover: Nay, he may bring an Action of Debt before Probate, and tho' it should appear, that the Probate

bears Date after the bringing the Action, yet 'twould be well enough. 1 *Roll Abr.* 917. But in case he had gone into the Spiritual Court and refused, then it would not be a Release; for no one shall be compelled to accept of a Release, no more than of a Deed: For the Obligor may plead *non est Factum* to the Bond, but till actual Refusal he is an Executor, tho' he dies before Probate. 20 *Ed. 4.* 17. 21 *Ed. 4.* 3. *Hardress* 111. And the Lord Peter's Case, which *Holt* said was argued and resolved in *Serjeants-Inn*, about four Years since.

Easter Term, 1705.

4 *Annæ Reginae in B. R.*

Anonymus.

Licence amounts to a Lease.

(1.) **Q.** IF a Licence is granted to a Man to use my Ground or my Yard, he thereby has an Interest in it; so that the Licence is not revocable, but it amounts to a Lease at Will; and this seem'd to be the Opinion of the Court, and that he thereby had such a Possession, as not to be turned out by a Revocation, but by an Ejectment.

Anonymus.

Justices of Peace's Power in forcible Entries, &c.

(2.) **HOLT** said, the Justices of Peace, in the Case of forcible Entries and Detainers, ought to adjourn their Courts, and give the Party an Opportunity to traverse the

the Force, or else the Party has no Remedy but by *Certiorari*; and every Inquisition is traversable by the Statute of *Westm.*

—But generally the Justices inquire into the Possession only, and award Restitution, without trying the forcible Detainer, or Entry, upon a Traverse. *Note*; A Tenant at Will cannot justify a forcible Detainer, till he has been three Years in Possession; but he ought to quit Possession, and apply to the Justices for a Restitution upon the forcible Entry.

Cockcroft vers. Smith.

(3.) **H**OLT said, if a Man strikes another, who does not immediately after resent it, but takes his Opportunity, and then sometime after falls upon him and beats him, in this Case, *son Assault* is no good Plea; neither ought a Man, in case of a small Assault, give a violent or an unsuitable Return; but in such Case, plead what is necessary for a Man's Defence, and not who struck first; tho' this he said has been the common Practice, but this he wished was alter'd; for hitting a Man a little Blow, with a little Stick, on the Shoulder, is not a Reason for him to draw a Sword and cut and hew the other, &c. In this Case, *Cockcroft* in the Scuffle ran his Finger towards *Smith's* Eyes, who bit a Joint off from the Plaintiff's Finger; and if this was a proper Defence, for the Defendant to justify in an Action of *Mayhem*, was the Question.

Son assault de mesme, where a good Plea, in *Mayhem*.

Hyde vers. Patridge.

(4.) **T**HE Case was; if the Statute of Limitations extended to a Suit in the Admiralty for Seamen's Wages.

Seamen's Wages. See now the Stat. of 5 *Anna*, for Amendment of the Law.

Mr. Serjeant *Darnel*. That it did not; because it proceeded according to the Civil Law: And likewise, that it ought not to be construed according to Equity, but to the Letter; and in the Statute there is no Mention of this Court;

Court; and it restrains Mens Liberty that they had at the Common Law; and therefore such Statutes ought to be taken strictly. *Plowd.* 34. *Hutt.* 109. 2 *Vent.* 345 or 335: *Cro. Car.* 539: 1 *Mod.* 245, 246. Another Reason he said was, he supposed the Law-makers very well knew that there was a Remedy, not only at our Law, but in the Admiralty too; and therefore, had they intended this Statute should have extended to the Admiralty, they would have mentioned it, especially since it proceeded by another Law; and therefore by Implication it ought not to extend to it. 1 *Roll Abr.* 531.

Mr. Common Serjeant *Dee contra.* For that tho' the Cause is marine, yet 'twas as much as if the Suit is for a Contract made at Land; the Common Law Courts must take Notice of it; the Statute he said says, *any Suit*, and this Proceeding can be no other than a Suit; and the Statute is pleadable in Chancery.

Holt Ch. J. said, if the Contract is made *super altum Mare*, the Statute does not extend to the Admiralty; but if it be made upon the Land, it does; and they have a necessary Jurisdiction; because the Ship is liable, by the Marine Law, till the Owner comes in, and gives Security to abide the Judgment; and then the Ship is discharged, and the Action becomes personal: *Powell* said, the Common Law's Indulgence to the Admiralty is of so long standing, that it is become a Right; and it would be very hard to make this Statute not to extend to any Suit but at Common Law. *Holt* said, an Action of Debt or an Award is out of the Statute: But then the Action must be brought for the Money awarded, and not upon the *Assumpsit* to stand to the Award. The Reason a Legacy is out of the Statute is, because it may be stopt till Debts are paid. But now by the Statute, for the Amendment of the Law, 4 *Annæ*, the Suit in the Admiralty must be commenced within six Years after the Cause of such Suit shall accrue, (with a Saving of Incapacities, &c.) See the Statute.

Anonymus.

Anonymus.

(6.) A Man brought to this Court by *Hab. Cor.* upon a Commitment by the Justices of Peace, who have Cognizance of the Cause, is not bailable, till the Order is quashed; because till then he is in Execution.

(7.) In the Common Pleas, upon a Recognizance entred into there, a *Fieri fac.* or *Elegit* may go, but no *Capias* lies; but otherwise in this Court a *Capias* lies, for here the Bail is Body for Body.

(8.) Mr. Serj. *Darnel* moved to amend a Declaration, which was carried down to *Winchester* to be tried, but finding something necessary omitted in it, did not try it; he said, it not being a Record but only a Paper, he prayed it might be amended upon Payment of Costs; which was granted *nisi causa.* *Absente Holt.*

(9.) Mr. Serjeant *Hooper* moved in Arrest of Judgment, on a Verdict upon the Statute of 23 of *El.* for not coming to Church for eleven Months: His Exception was, that the Statute requires the Prosecution thereon to be brought within a Year and a Day, but this Action was brought three Weeks after the Year, and the Verdict was for the whole: But Mr. Justice *Powell* told him, he put them, *vide* the other Side, in Mind of curing this Mistake, they not having entred up their Judgment: For he said, if they entred up their Judgment for no more than was within the Time limited by the Act, *viz.* for no more Months than were within the Year; then it would not be Error.

(10.) *Holt* said, If a Farm is out of Repair in the Life of the Ancestor, and after the Heir brings an Action, he shall recover Damages for the whole Time: But the Heir ought not to alledge a Breach in the Ancestor's Time, because that belongs to the Executor.

Re-pleader.

(11.) To put a Matter of Law in Issue to a Jury is void. But *Holt* said, it would be helped by a Verdict; where an Issue is wholly immaterial, then there must be a Re-pleader. See 6 Mod. 2, 3, & *ibid.*

Trespass by Patron till Induction.

(12.) If a Parson is instituted only, he cannot have an Action of Trespass till Induction. But *Holt* said, he is intitled to the Spiritual Profits, as Oblations, &c. before Induction: He is likewise liable to be fined in the Spiritual Court before Induction, if he neglects the Cure; but he cannot sue for great Tithes before Induction, for they are Temporal.

Vicar General not restrained.

(13.) If a Bishop grants a Patent to a Man to be Vicar General, wherein he reserves a Jurisdiction to himself; It seems to be repugnant and void. So where a Bishop grants his Chancellorship with a Reservation to himself of Institution and Induction. And *Holt* said, what cannot a Vicar General do; for if he is restrained, he is not a Vicar General.

Colonel Laiton's Case.

Commitment by Lord Mayor for forcible Entry in the Fleet Prison. *Vide post.*

(14.) HE was brought into Court by *Hab. Cor.* having been committed by the Lord Mayor of London, on his own View, for a forcible Entry into the Fleet Prison, and for a forcible Detainer thereof. The Title *Laiton* claimed by, was, that this Prison was, by a Judgment of this Court, seized into the Queen's Hands, under whom he claimed. Sir *James Mountague* excepted, that it did not appear that it was done by a Justice of the Peace; for the Subscription was by *Owen Buckingham* Mayor, and did not say a Justice of the Peace. *Raymond*: 'Tis necessary that the Person that commits for a forcible Entry ought to intitle himself to a Jurisdiction, by subscribing himself a Justice of Peace. *Lamb. 160. 2dly*, A Justice cannot set a Fine by Virtue of the Statute, but ought to refer to the Quarter-Sessions. 2 Cro. -- 41. *Kilway*. What Power the Ju-

Justices have ought to be executed *eo instante*. Another Exception was, that 'twas said to be within the Liberties, and not within the City it self; for the Lord Mayor has not Jurisdiction every where within the Liberties. Mr. Attorney, in answer to the Objection, that the Lord Mayor did not shew himself to be a Justice, said the Court would couple the Warrant to the Conviction; for that he said was the Reason of removing it hither by *Certiorari*; whereby it would appear to the Court, that there was a Judgment to found the Warrant of Commitment upon. Serj. *Frederick*, That the Lord Mayor of London, *virtute officii*, before any Acts of Parliament for Justices of the Peace, was a Conservator of the Peace; and thereof the Court would take Notice, and also upon Account of the Stat. 8 H. 8 or 6. which makes all Mayors Justices of the Peace; and the Warrant has a Reference to the Conviction; and so long as the Conviction stands, the Warrant shall be supplied by a Reference to that: By the Record it appeared to be done all *eo instante*; and so the Objection is answered. Mr. *Ayres*, this is a Commitment in Execution. 15 R. 2. is founded upon 5 R. 2. and so is 8 H. 6. *Holt* said, the Justices of Peace may set a Fine, but he ought immediately to commit him, where by his own View he finds a forcible Detaining; and then as he is a Judge of Record, he may adjourn his Court, and then set a Fine upon him, and commit him in the mean Time. As for the Objection of his Signing Mayor and not Justice, 'twas sufficiently answered, that that Defect was supplied by the Statute, which makes all Mayors Justices; *per totam Curiam*. *Holt* said, upon a View of forcible Detainer, the Party may plead, that he and his Ancestors have been in peaceable Possession three Years; and the Justice ought to accept the Plea, and try it as well in this Case, as in the Case of Restitution, and ought to stop Restitution till such Issue is tried. By the Common Law, he said, a Man might defend his House by Force and Arms, for 'tis his Castle; but these Statutes restrain him. To be spoke to again; *vide post*. Number 30. 1 Jon. 44.

Scandal.

(15.) A Prohibition to the Spiritual Court was refused for Calling a Woman *Brandy-nosed Whore*. Mr. *Earl* insisted upon several Authorities, that for Calling a Woman Whore was only Words of Heat; but the Court were unanimous, that, notwithstanding the former Practice, a Prohibition should not go, for that it is a great Defamation.

Smith —

Special Promise to one on doing an Act to a Third.

(16.) A Declaration on a special Promise, that he would pay so much Money, in Consideration the Plaintiff would deliver up such a Bond; and avers, that he did deliver up the Bond. Mr. *Ayres* objected, that he did not set forth that he gave Notice to the Defendant; and that it was not said to whom the Bond was to be delivered; he cited *Cro. Car.* 577, 77. *Cro. El.* 229.

Sir *J. Mountague*, cont. He cited 1 *Lev. Price and Evans. Cro. El.* 97.

Notice.

Holt. A general Promise to pay Money when a Bond is delivered up, it must be intended to be delivered up to the Obligor, tho' he is a third Person; and the Defendant ought to take Notice of the Delivery, for he might have applied to the Obligor to have had Notice: For where either Party might have had Notice by their own Inquiry, Notice is not necessary. *Holt* said, in case of Marriage of one self, Notice need not be averred; because Marriage is of it self notorious. But *Powell* doubted.

Custom in Restraint of Trade, ill.

(17.) 'Tis not reasonable always to inquire into the original Ground or Foundation of an antient Custom. The Case of the Mayor and Commonalty of the City of *Winchester*, in a special Verdict, wherein a Custom was found to restrain any Stranger from setting up a Trade of . . . unless he was qualified according to the Custom, &c. And 'twas questioned, if such a Custom be good in any other City than *London*; it being a Custom restraining the Liberty of the Subject in a Matter so beneficial to the Kingdom

dom as Trade is. *Darnel* cited *Palmer* 2, 3, 4, 5. 2 *Roll's Rep.* 203. 8 *E.* 3. 37. *Hob.* 85. *Moor* 871. 4 *Mod.* 421.

Mr. *Raymond*, That this Custom is not good, cited 8 *Co.* *Waggener's Case*. 11 *Co.* 53. 2 *H.* 6. 5. pl. 26. *Cro. Jac.* 196. 210. 2 *Roll* 277. 1 *Lutwich* 562. He insisted principally on *Waggener's Case*; and that great Stress was laid on Confirmations of Acts of Parliament in that Case. 9 *Co.* 59. 1 *Lev.* 262. *Cro. El.* 185, 803. *Holt*. Whenever a Town is incorporate, it is as well for the Benefit of the Inhabitants in general, as a Freeman, where it is for the Benefit of a Trade; and a By-Law will extend to both. The City of *London* has a Power to qualify Persons, and to oblige Infants, if they bound themselves, to stand to their Indentures, notwithstanding their Non-age; but there is no such Custom any where else; which occasioned the Statute of 5 *El.* which binds Infants. Note; The Court seemed to be of Opinion, it was a bad Custom. But Judgment was given upon the Defect of the Declaration; for that the Plaintiffs had not intitled themselves to the Action. And Justice *Powell* said, most of the Corporations in *England*, that are by Prescription, assume this Custom. But he gave no Opinion of it.

Sir William Drake vers. - - -

(18.) A Motion was made for a special Writ, to be had by Rule of Court, against a Person, to hold him to special Bail, for speaking very scandalous Words against Sir William Drake, (viz.) *That he was a Traitor, one of the 134, for bringing in the Prince of Wales, &c.* But the Court refused to grant it; and said 'twas refused in the Lord Wharton's Case, for Scand' of a Peer.

No special
Bail in Star-
dal.

(19.) Sir James Mountague moved the Court to *amercé* an Under-Bailiff of Westminster, for not making a Return of a Writ. But the Court thought the Motion improper. For that the Sheriff is the Officer of this Court. The Court in this Case made a Rule for the Bailiffs to return it, and

Under-Bailiffs
not amercia-
ble.

and for Disobeying that, bring them into Contempt. *Vide*
8 Annæ, N.º.

Luttin and Benin.

No Escape
 can be where
 the Arrest is
 illegal, i. e.
 out of the Ju-
 risdiction.

(20.) **A**ction of Escape against a Serjeant of *Wood-street*
Counter; upon Not guilty pleaded, it appeared
 that the Action, on which he arrested the Person escaped,
 arose out of the Jurisdiction; and the Process was exe-
 cuted out of the Jurisdiction. *Mr. Ayres.* Where an Infe-
 rior Court holds Plea of Matters out of their Jurisdiction,
 'tis *coram non Judice*. There is a Difference between proceed-
 ing erroneously where they have Jurisdiction, and where
 they have no Jurisdiction. *Cro. Car.* 394. *Hardres* 480. That
 Actions will lie against Officers appears from the Aver-
 ment necessary for the Officer, (*viz.*) that the Cause was
infra Jurisdictionem in order to justify: And if an Infe-
 rior Court holds Plea of a Matter out of their Jurisdiction,
 all their Proceedings are void, and *coram non Judice*, and
 may be avoided by Plea. *March* 117. 3 *Lev.* 243. But
 where they have no Jurisdiction, no Action will lie. 3 *Lev.*
 234, 23. 1 *Roll's Abr.* 809. That Actions may be brought
 against the Officer, as well as against the Plaintiff, 2 *Mod.*
 195. 2 *Cro.* 3. *Sir T. Jones* 214. 4 *Rep.* 14. b. 2 *Lutw.* 935,
 1516. 2 *Mod.* 30. *Cro. El.* 836. *Hob.* 267. 1 *Vent.* 86.
 If a Man brings an Action in an Inferior Court, as in the
Star-Chamber, an Action will lie: And so where a Man
 sues *coram non Judice*, 1 *Lev.* 95. 1 *Sid.* 125. it not being
 in the ordinary Way of Justice. That no Action of Escape
 will lie in this Case, v. 1 *Roll Abr.* 547. *March* 8. 2 *Bulst.* 64.
 2 *Mod.* 29. *Mr. Whitacre, cont.* v. 2 *Inst.* 230. 3 *Keb.* 852. 2
Vent. 236. *Raym. Rep.* 189. 26 *Ed.* 3. 16. It being a Matter
 transitory, and the Court having *prima facie* a Jurisdiction,
 no one shall take Advantage of it, *Yelv.* 42. 2 *Cro.* 3. but
 the Defendant. 2 *Bulstrode* 62. And it shall be at his E-
 lection to avoid it by Plea or not; and the Defendant in
 this Case is a Wrong-Doer, and so shall not take Advan-
 tage of his own Wrong: He said, he was informed, that
 in the City of *London*, they never say the Cause of Action
 arose

arose within the Jurisdiction, as they must in all other Inferior Jurisdictions. A Sheriff cannot take Advantage of any erroneous Proceedings, if he suffers an Escape.

As to the Limitations of Inferior Jurisdiction, *Holt* said, these three Things are to be considered, (*viz.*) Persons, Time and Place. As to Persons and Place; as in the Case of the *Marshalsea*, and those of the Household: For in that Court, they have Jurisdiction only in Debt, Trespass and Covenant, and therefore should they hold Plea of an Action on the Case, 'tis plain they have no Jurisdiction. And as to Things, he said, the City have Jurisdiction in all Causes, and are only restrained to Place; and therefore the Defendant ought to have pleaded to the Jurisdiction. For if he admits of the Jurisdiction, he is for ever after estopped. And an Issue may be taken upon it; and if it be found to arise within the Jurisdiction, Judgment final ought to be given. If a Man is wrongfully brought into a Jurisdiction, and there lawfully arrested, yet he ought to be discharged; for no lawful Thing, founded upon a wrongful Act, can be supported. If a Justice of Peace makes an Order for a Man to keep a Bastard-Child, which in Reality was born two Days after Marriage, in this Case, all the Officers acting under that are wrong, and they are liable; because a Justice can have no Jurisdiction of the Thing. But in this Case the Court had Jurisdiction of the Thing, and therefore it ought to have been avoided by Plea. Mr. Justice *Powell* was of the same Opinion; and said, where an Inferior Court had Jurisdiction in a transitory Action, the Defendant ought to plead it, otherwise *non constat*, but it did arise within the Jurisdiction; and to make it *coram non Judice*, it must appear that the Court have no Jurisdiction. *Powis* and *Gold* of the same Opinion; so Judgment was, that the Officer was liable to the Action; *Nisi* the Defendant shews Cause within a Week.

Jurisdiction
admitted by
Plea.

Note.

(21.) Dating of a Bond to be at a certain Place, makes it local; and should the City of *London* hold Plea, if it were dated at *York*, 'twould be erroneous: But the making of

Bond dated at
B. is local.

of a Bond without dating, makes it transitory, and may be said to be made all over *England*.

Cockcroft verſ. Smith.

No new Trial
in Battery.

(22.) **M**Otion for a new Trial. The Caſe was in a Battery: It appeared, that the Plaintiff had a material Witneſs that he knew to be ſick, and yet went on with the Trial; whereas he ſhould have paid Coſts, and put off the Trial. *Holt* doubted if the Court could grant a new Trial. *Powell* ſaid, it being in the Caſe of Battery, which might affect a Man all his Life, he was inclinable to grant a new Trial. But it appearing he might have had another Witneſs to the ſame Purpoſe, they were unwilling to grant one. Adjourn'd.

Commitment
in forcible
Detainer.

(23.) Upon the Statute of forcible Detainer, where the Juſtice finds it upon his own View, he muſt immediately commit, and cannot adjourn the Commitment; but it muſt be done *eo inſtante*; as in the Caſe of Auditors on Account, ſo if he has recorded the Force: But *Holt* ſaid, ſo long as the Matter is under Examination, he may adjourn. *Vide ante.*

Hab. Corp.
Commitment.

(24.) When a Perſon comes to this Court upon a *Hab. Corp.* and this Court thinks fit to turn him over to the Maſter, they commit him for no other Matter than for the Cauſe or Cauſes return'd on the *Hab. Corp.*

Juſtices of
Peace.

(25.) *Holt* ſaid, a Juſtice that had Power to ſet a Fine, has Power to Bail; for he is not obliged and bound to commit him; but after he is once committed in Execution, 'tis too late to move for Bail.

Changing
Venue's.

(26.) *Q.* If the Rules for changing of *Venue's* extends to Bills of Exchange, the Court doubted; but ſeemed to be of Opinion, that they did not, for the Inconvenience that might enſue.

(27.) *Holt* said, that by the Common Law; without the Help of any Statute, any Judge, either of this Court or the Common Pleas, may take a Recognizance for any Sum on Condition: For if a Man will voluntarily enter into it, a Judge has Power to take it. Judges taking Recognizances.

(28.) For the Nature of Freehold Lands, and Lands held by Copy of Court-Roll, *v. 4 Rep. 31. 5 Rep. 84 or 34. Ad voluntatem Domini* is the distinguishing Mark of a Copyhold. *V. 2 Lut. 1165, 1171. 3 Bulst. 230. 2 Vent. 143. Cro. El. 185.* As to setting forth a Custom, *Rastal's Ent. 62. 2 Brownlow's Decla. 96. Cro. Car. 418.* By *Holt*. Where a Custom is, that all Lands held of that Manor shall pass by Surrender and Admittance; yet the Lands may be Freehold; and the Manner of Conveyance is Customary, in as much as Livery is not requisite. And he said, *The Freeholds themselves can never be Parcel of the Manor, but 'tis the Services. Quere.* Difference of Freeholders and Copyholders.

(29.) A Man that claims Common in another Man's Land, must set forth a Title: But a Man, that is in Possession, need not set out a Title. Title of Common.

Domina Regina vers. Wiat.

(30.) [Indictment in the County of *Sussex*; several Persons convicted for Killing, and being Aiding and Assisting to killing Deer, and a Warrant to levy a Distress; which Warrant by a Clause in it was to be returned; the Warrant was delivered to the Defendant, who levied the Money, but made no Return of the Warrant, which was the Offence, and was removed here by *Certiorari*. Sir *James Mountague* for the Defendant said, that the not returning the Warrant is not an Offence criminal to be indicted upon; and finding the Money to be levied, makes for the Defendant. He excepted, that there ought to have been a Time and Place when and where he should have returned this Warrant to them, for he is not bound to travel over *England*. Deer-stealers. The Constable levying the Penalty, and not returning the Warrant, indictable.

land to find them. Again, his Warrant is his Justification and Indemnity, in case he should be sued for a Trespas. Mr. Serjeant *Broderick cont.* By the very Frame and Design of the Act of Parliament, 'tis the Duty of the Constable to make a Return of his Warrant; (v. the Statute.) He said, how could the Justices know how to distribute the Poor's Part, unless 'tis returned to the Justices what Money is levied. The Constable is in this Case made a Publick Officer, and 'tis a Misbehaviour of him. In answer to the Objection of travelling over *England* to find them, he said, Justices are always supposed resident within their own Counties.

But by *Holt* Chief Justice, There is a Difference between returning the Warrant it self, and returning what he has done. The not fixing a Time when, and Place where, is no Fault; for he should have done it forthwith, and any where within the County suffices. *Powell.* The Return is necessary; because he may levy only Part, and then further Process should go out: For if the whole cannot be levied, then the Justices must go upon another Part of the Act. And *per tot' Cur'*; 'Tis an Offence indictable, for not returning what he has done. *Holt* said, if a Man is under three Convictions, and his Goods are sufficient to answer two of them, the Money shall be paid, and he shall stand in the Pillory for the third: But on one Conviction, if he wants but 2 s. in the whole, the Justices cannot take it, but he must be imprisoned, and stand in the Pillory for it afterwards. *Ayres,* That the Conviction was naught; for that it was not set forth, that the Examination and Oath were within the Jurisdiction of the Justices. He objected, that he was indicted for not returning the very Warrant it self; which he said he ought to keep for his own Indemnity. Mr. Attorney, as to the Objection, said, That 'twas in the Indictment, that he was *debito modo* convicted: Judgment was staid till the first Day of next Term, for the Resolution of the Court, when Judgment was given against the Defendant. *Holt* differing; not but that he said, it was an Offence. But he said, in all Process there ought to be a Place, and a Time for the Return.

Contra Pacem in an Indictment for a Non-feasance, is *Contra Pacem*. not necessary.

Domina Regina vers. Bass.

(31.) **I**ndictment for Conspiracy, intending to scandalize a Person, and to get Money out of him, by alleging him to be the Father of a Child which such a Woman was big with; but the Indictment does not say it was a Bastard-Child. Mr. Serj. Weld. A Conspiracy to do an ill Thing, where nothing is done to put it in Execution; stands singly upon the Intention, and is not an ill or criminal Thing; it doth not appear in the Indictment, that the Matter of Slander is false, and therefore it must be intended true. In an Indictment of this Nature, or in Case of Perjury *falso & malitiose*, &c. do not make the Charge to be false; but these Words, *ubi revera* it is not true. Long's Case, in 5 Rep. But Holt said that Case was very nice, and by his Consent they should not be so nice again; and he questioned, if any one Case in the Law was like it. Mr. Serj. said, Vaux's Case was something like it. Holt said, if two or three Persons meet together, and discourse and conspire how to accuse another falsely of an Offence, it is of it self an Overt-act, and is an Offence indictable: So if two or three meet together to conspire the Death of the Queen, yet tho' there was nothing but Words passed, the very Assembling together was an Overt-act. 1 Vent. 304.

Conspiracy in charging one with being Father of a Child, not saying Bastard.

The Exception the Court went upon was, that it did not sufficiently appear that the Charge was criminal, it not appearing the Child was a Bastard. Yet the Court said, this Exception, *viz.* the not laying it to be a Bastard-Child in the Indictment, was *prima Impressionis*. Powell said, if People met together to consult or conspire; to make it criminal, they ought to come to some Resolution; then he thought, if it appeared that he repented, it might alter the Case. The Court took Time to consider of Precedents,

cedents, 2 *Keb.* 59. and see if any went upon the Omis-
sion of *Bastard* in the Indictment.

Goddard vers. Smith.

The Practice
of *Nonprosses*
and *Cessat*
processus, dis-
approved.

(32.) **H**OLT seemed to disallow of *Nonprosses* and *Cessat*
processus; for the proper Way would be to plead
Not guilty, and the Attorney General to come in and
confess it. And Mr. *Harcourt* said, the first *Nonpross* was
in the 16th Year of *Car.* 2. 'Twas a Doubt if an Action
of Conspiracy would lie upon such an Acquittal, for the
Declaration must be, that he was *debito modo acquietatus*. Serj.
Darnel said, suppose a Man declares he was prosecuted,
quousque there was an Entry of a *Nonpross*, would that
have been good? to which the Court gave no direct An-
swer, but seemed to incline that it would not; for the
Nonpross is not a Discharge of the Crime, but only of the
Indictment: And they went upon Mr. *Harcourt's* Rep. That
they used to indict them again, and not to proceed upon
the same Indictment. *V. Post. Trin. 6 Annæ Number 1. Ogle-*
thorp's Case.

Domina Regina vers. Inhabitants of
Stratford.

Indictment.
Highway.

(33.) **E**RROR to reverse a Judgment given in an Indict-
ment, for not repairing the Highways. Mr. *Ray-*
mond excepted, that 'twas not said the Ways were out of
Repair; but that 'twas *tam angusta, fœda & lutoſa*, as to
hinder the Queen's Subjects passing: Now it did not ap-
pear but that it was antiently so, and that it was not nar-
rower than before; but it was not shewn that the Way
was streightned, and delayed, for which the Court thought
it was insufficient; but put off Judgment till next Term,
upon the Prayer of *Nortcliff*, that he might inspect the
Record. Judgment to reverse it, *Nisi causa* by the last Day
of *Trinity Term*.

the Common Law, which the Statute made a Fee-tail; for this Statute was made to prevent the Abuses of the Will, in giving a second Heir, or Tenant by Curtesy. He

(34.) **A** Surrender was of a Copyhold Estate for Life, the Remainder to a Man and his Wife for Life, and their Heirs and Assigns; and for Default of such Issue, the Remainder over: The Question is, what Estate the Man and his Wife have, there not being the Words, *of their Bodies*. Gold held it an Estate-tail; and he said, he made a Difference between a Copyhold and Freehold Estate, *quoad* this; he compared this Case to *Herisford's Case*, in the 7 *Rep.* and *Peck's Case*, in *Littleton's Rep.* he said, such Issue qualified the general Words. *Litt. Rep.* 347. *Moor* 424. He took a Difference between a Grant to a Man and his Heirs, and the Heirs of him. *Plowd.* 541. 1 *Leo.* 40. *Powis* held it a Fee-simple; to make an Estate-tail, it must appear from what Body the Issue must come. *Litt. Sect.* 31. But in case of a Devise 'tis otherwise, because of the Intention. *Hob.* 32. *Co. Lit.* 27. And being *inops consilii*, 9 *H.* 6. 25. *Cro. El.* 474. he said, in a Conveyance, *De corpore* is an essential Part; but there may be Words tantamount. 37 *Aff. pl.* 17. 5 *H.* 5. 6. *Cro. El.* 473. *Fitz. Abr.* 743: It being an Estate to the Husband and Wife, and their Heirs, the Words, *and for Default of such Issue*, are uncertain, whether 'tis meant the Issue of both, or of the Survivor; he made no Difference between the Limitation of a Freehold and a Copyhold, and cited *Cro. Car.* 367. 2 *Sid.* 41. The Will of the Donor is to be observed in Estates-tail, but then the Will must be *manifeste expressa*. In Conveyances the Limitation of Estates have known Words; and he said, it would be of dangerous Consequence to allow a Latitude. *Powell* held it a Fee-simple; for the Words were, *and to the Heirs of the aforesaid Baron and Feme, and pro defectu talis exitus*. He was not for confounding Estates-Tail and Fee; for tho' the Intent of the Parties might be to make an Estate-tail, yet he would suffer a Mischief, rather than an Inconvenience. He inquired if there was any Thing in this Case to make it a Fee-simple conditional

Surrender of
Copyhold for
Life with Re-
mainder.

at Common Law, which the Statute *de donis* has now made a Fee-tail; for this Statute was made to prevent the Abuses of the Wills of Donors, by letting a second Husband or Wife be dowable, or Tenant by Curtesy. He could not see the Difference, that *Gold* took, between a Gift to a Man and his Heirs, and to the Heirs of that Man; he thought they had gone too far already in Matters of Intent, which made the Law so uncertain; and in this Case there was nothing but general Words for the Words *such Issue* to refer to. *Holt* held, that this is a Fee, and, by no Means can be construed a Fee-tail. He owned the Intention was to make it a Tail, but he could by no Rule of Law do so, without manifest Violation of Law. He said, Surrenders must be construed as Deeds. *Litt. Sess. 31*. To make a Tail, there must be a Description of the Body from whence the Heirs must come. *Co. Lit. 27*. There is a great deal of Difference between a Man's expressing his Intent in a Will, and in a Conveyance; for in the last, the Law has established certain legal Words, and no other, tho' they are tantamount, will do; but in a Will, he said, the Statute 32 H. 8. gives him Power to convey away his Lands at his Will and Pleasure; and he relied upon the Words *Will and Pleasure*. Had the subsequent Words, *pro defectu talis exitis*, been consistent with the first Words, they would have qualified the general Words. If a Man give an Estate to a Bastard, and his Heirs, and if he die without Issue, the Remainder over, this is void; for 'tis a Limitation upon a Fee, to defeat and defraud the Lord of his Escheat. *Jones 342. Abraham and Twigg*, he said was a great Authority in this Case; and he said he could not distinguish between them. *Co. Lit. fol. 20*. He said, a Grant to Man and his Heirs lawfully begotten, would be a Fee, but to a Man and the Heirs of him, would be a Tail.

To construe this an Estate-tail would be repugnant to the Premises, because it is to them and their Assigns; so that it is designed an assignable Estate, which is contrary to an Estate-tail, for that is restrained by the Statute. *Hob. 170. Dyer 264*. He said, as the Intent of the Parties

Parties is to be considered, so the Rules of Law are to be observed.

Queen ver. West.

(35.) **T**HE Defendant had an Order made upon him, by two Justices, for keeping a Bastard-Child; he appealed to the General Quarter-Sessions, who confirmed the Order, and committed him for Disobedience to their Order. He was brought here by *Hab' Corp'*, and 'twas moved by Mr. King that he might be discharged; for that the Justices ought not to have committed him, but to have proceeded upon his Recognizance; and of that Opinion the Court seemed to be. 2 *Bulstrode* 341. There was a Fault in the first Order, which was, Dr. Fuller and another, two of her Majesty's Justices of the Peace, doth adjudge, *Uc. Cro. El.* 108. *Cro. Car.* 464. But the Court thought this not sufficient to quash the Order: But they quashed it, for that it appeared, the Justices ordered him to pay an excessive Sum. And *Note*; tho' they quashed the Order, they ordered him to appear the next Sessions.

Order for keeping a Bastard.

Colonel Layton's Case.

Ante N. 14.

(36.) **H**OLT ordered Precedents to be search'd, If a Person in Execution for a Fine can be bailed, having brought a Writ of Error, and assigned Error. (*Note*; Colonel Layton was brought up by *Hab' Corp'*.) See *Cro. Car.* 557. 1 *Sid.* 320, 296 or 286. 1 *Keb.* 88. After Precedents searched, Holt said, he found the Cases not put fair in Case of Execution; and said, Bail in Case of Execution was always refused; and of this Opinion were the whole Court now, and remanded him. See 2 *Keb.* 173. a Difference between Bail to reverse an Outlawry and to reverse a Judgment; because in the first Case he is liable; for that is in order to bring the Cause to a Trial; and the latter is to defeat the whole Record. *Vide ante N. 14.*

One in Execution for a Fine, not bailable.

Startup

Startup vers. Doderidge.

A *Modus* un-
certain, &c.
is void.

(37.) **T**HE following Cases were cited by Mr. Pengelly, to shew where a *Modus* is uncertain, or exposes the Parson to be defrauded, 'tis a void *Modus*; and he made a Difference between a Certainty arising upon a Contract between the Parties, and where 'tis of common Right. 3 Cro. 139. 2 Roll 264. 1 Keb. 612. Hob. 107. Styles 397. 2 Cro. 671. *Broderick cont.* as in Cases of Tenures, 11 Co. 15. 2 Leon. 107. 3 Mod. 132. 4 Inst. 96 or 91. Holt said, whatever may be good by Agreement, may be good by Custom; and as Custom may diminish Tithe, so it may increase them. So by Custom, Lead in *Darbyshire* pays Tithe. Whenever a *Modus* runs high, 'tis a strong Presumption 'tis no *Modus*. Note; In this Case the Court refused a Prohibition; for that it appeared the *Modus* (as 'twas pretended to be) was of nigh the full Value.

Trin. Term. 1705.

4 Annæ Reginae in B. R.

Anonymus.

Presumption.
Scandal.

(i.) **M**R. Serjeant Darnel moved in Arrest of Judgment, in an Action for Words; the Words were, *you have forgot since you lived in the Black-Bull Yard; you are a Rascal and a Villain; there you could procure Broad Money, and could clip it when you had done, and there the Sheers could go.* He insisted upon it, that
here

here was nothing in these Words alledged but only a Power of doing, but no positive Charge. *Powell* said, taking the Words altogether, they would bear a strong Intendment that the Fact was done. *Holt* put this Case: Suppose a Man is dead, and *A.* says *John of Styles* could have murdered him; *Q.* if this would be actionable. The Court took two or three Days to consider of it: But afterwards the Plaintiff had his Judgment.

Page vers. *Hayward.*

V. ante.

(2.) TWO general Questions were: 1. Concerning the Estate the Sisters take. 2. If the Recovery suffered is sufficient to dock the Tail. And resolved *per Cur.* 1. *Mary* takes an Estate-tail in Possession, and the other an Estate-tail in Remainder. See *Co. Lit.* 26. b. 17 E. 2. 23. *Holt* also said, the Statute *de donis* is not to be taken strictly, but all Limitations, within the meaning of the Statute, ought to be supported: Words of an express Condition shall not ordinarily be construed as a Limitation: But where an Estate is to remain over for Breach of a Condition, which is by express Words of a Condition, yet it ought to be intended as a Limitation. Suppose a *Præcipe* is brought against Tenant in Tail and a Stranger, is this a Flaw? Surely no: Such a Recovery I hold good. 2dly, I hold Tenant in Tail may well make a Tenant to the *Præcipe*. See 2 Roll 194. tit. Common Recovery. *Styles* 319. 3 Cro. 21. 2 Cro. 318.

Of Limitations and Conditions.

Queen vers. *Johnson.*

(3.) MR. Serjeant *Broderick* moved to quash an Indictment, which set forth, that a Justice had committed a Woman to Prison, there to be kept till further Examination; and that because the Officer did not carry her to Prison, but kept her in his own House, (though he brought her forth upon Demand,) he was indicted, as disobeying the Justice's Order, and behaving himself Negligently,

Officer indictable for not imprisoning one committed.

gently, &c. The Commitment was on *Saturday*, and he brought her forth before the Justices on *Monday*; *Per Cur'*, He ought to have carried her to Prison forthwith; whereupon the Court refused to quash it. It appeared also, that during the Time, he took a Note from her for 10*s.* which the Court held a great Misdemeanor. *V. Queen v. Belwood, post. N. 17.*

Bishop of Cloyne's Case. Error out of Ireland.

Error from
Ireland.
Of Vicars
General.
If the Chan-
cellor of a
Diocese is
faulty, the
Archbishop
has Cogni-
zance of it,
not the Bi-
shop. 2.

(4.) *DR. Lane.* If a Chancellor of a Diocese commit an Irregularity in his Office, the Bishop cannot call him to an Account in his own Court; but ought to carry it before the Archbishop. A Vicar General is created by a Bishop, but his Office is by the Law; and he may exercise such a Jurisdiction as belongs to his Office; which is a general Jurisdiction, and the Bishop cannot hear Causes himself, neither matrimonial or other, but it must be done by his proper Officer; and if he refuses or neglects to make an Officer, the Law has taken Care to provide that the Archbishop, and then the Queen shall. Every Presentation ought to be under the Seal of the Consistory Court; for he said, he knew no other Seal, neither had the Bishop any other Court, but the Consistory Court. Bishops may delegate all external Jurisdictions, but Consecration of Churches, or Confirmation, &c. which are annexed to the Person of the Bishop. There is no Difference between a Vicar General and a Chancellor. *Linwood, li. 2. tit. 4. pa. 104.* describes what the Vicar General may do. *Sequestration.* A Vicar General cannot dispose of any Livings in the Gift of the Bishop, because it is annexed to the Bishop as his personal Property. *Li. 3. Decr. ti. 6.*

Institution and
Induction.

Institution and Induction is an Act of the Law; and tho' by his Granting the Vicar General Institution and Induction, he was not concluded himself, yet his Vicar hath a concurring Jurisdiction. He compared the excepting Institution and Induction in the general Grant to the Chan-
cellor,

cellor, to a Lord of a Manor's granting a Patent to his Steward, reserving that his Steward should not take a Surrender, nor make an Admittance; this he said was a Nullity: For when the Bishop or Lord has made him an Officer, the Law gives him his Power. *Reservatis nobis* such a Jurisdiction of it self does not exclude the Chancellor; but only leaves a Power to the Bishop, which otherwise he would have lost, and so they have a concurring Jurisdiction.

Dr. Floyd. A Vicar General is a Temporal Officer, and the Bishop might have turned him out at Pleasure; but by the Confirmation of the Dean and Chapter, and by the Temporal Law, he has a Freehold; But the Intent of the Law was not to give away all the Authority from the Bishop, but the Chancellor was only to assist and help the Bishop. He said, the Law would not take Notice of a Certificate upon a *Capias Excom'* from a Chancellor; for in the Eye of the Law, the Bishop is the Ordinary. There is a Difference between *Judices Ordinarii* and *Judices Delegati* in the Civil Law. Granting of Licences to School-masters belongs to the Bishop; and no Chancellor ever pretended to this. He said, that by a general Grant of a Chancellorship, the Power of Institution, Induction, &c. does not pass, without special Words, and so many other Things which are inherent in a Bishop. But if Institution belongs to the Office of a Vicar General, then such a Revocation is void and repugnant; which the Court seemed to agree in. The Court ordered Search how their ancient Patents run, and if there were antiently any Revocations. Holt said, he thought the Bishop might sit in Court, for he is a Judge; but he cannot deprive his Chancellor of his Temporal Fees. If before the Statute of H. 8. which enables Laymen to be Chancellors, Institution *de Jure* belong'd to the Chancellors; then reserving this now is void: But if it requires special Words to pass it, then it may be reserved. But it being a Matter of great Moment, the Court ordered it to be argued again next Term.

(5.) Mr. Eyres moved to quash an Indictment against a Woman, for using the Trade of a Millener, not having served

Indictment
for using the
Trade of a
Millener.

served an Apprenticeship. But the Court refused to quash it; and *Holt* said, it ought to be tried if it was within the Statute or not: For it did not appear to the Court but that it might be a Trade at the Time of making the Statute; and all Trades are not enumerated in the Statute, but yet they may be within the Meaning.

An Attempt
to Rescue will
justify an
Assault.

(6.) The Case was in an Assault; it appeared the Defendant came *manu forti* to rescue a Distress from the Plaintiff; and that the Plaintiff had not Time to request him to forbear, therefore the Assault was well justified; *per Cur.* 2 Roll Abr. 549.

Mich. Term. 1705.

4 Annæ Reginae in B. R.

Return of a
Mandamus.

(1.) **A** Rule was made, that where a *Mandamus* went above forty Miles, the Return should be at least fifteen Days; and where under forty Miles, eight Days at least.

Surplusage in
a Verdict
rejected.

(2.) When a Jury bring in a Verdict, and there is Surplusage, the Court will reject the Surplusage. 3 Leo. 80. 7 H. 6. 20. 1 Leo. 323.

Queen vers. Whiten.

Order of Set-
tlement
quashed.

(3.) **U**PON a Motion to quash an Order of Sessions upon a Settlement, for that it was not in the Order, that they adjudged him to be last settled in such a Parish he came from; the Court held it not necessary so to adjudge it; but it not appearing in the Order, that he

he had been chargeable to the Parish, but only that, *whereas* he was likely to become chargeable, the Court quashed it; for by the Certificate the Parish is bound to receive him, and cannot remove him till he becomes chargeable actually.

Swaine and Stevens.

(4.) **I**N Case of a *Scire fac'* against several Ter-tenants, they cannot join in a Plea, but ought to plead severally. *Q.* If after a Plea in Abatement, a special Nottenture may be pleaded; for *Holt* said, by Pleading in Abatement, he had admitted himself Tenant. See 8 Ed. 4. 19. b. 2 Brown v. Owen 134, 16. 1 Inst. 121. Cro. El. 122, 739, 740. 2 Roll 144. 1 Lev. 190. 7 H. 6. 25. b. 8 H. 6. 32. b. 2 Keb. 46.

Ter-tenants
to sever in
Pleading.

Bridge vers. the Parish of St. Mary-bone.

(5.) **O**N certifying an Order of Justices, upon the Statute 4 El. 6. An Exception to the Order was, that the Judgment ought to have been, that in as much as they had ordered him to pay the Money, and he had refused to pay, then to commit him; but in this Case it was, that they ordered him to pay so much, and in case he refused, then, &c. *Holt* said, the Act directs in what Manner the Money shall be levied; that is first an Order or a Judgment that he is in Arrear; then if he does make an actual Refusal, an Award of a Distress; and if upon a Return that he has nothing to be distrained by, then a Commitment.

Order of Ba-
stardy.

The Court confirmed that Part of the Order relating to his Payment of the Money, and quashed the Order for the Commitment; *Nisi* in a Week. *Vide post. Mich. 6 Annæ, N. 1.*

Knight vers. Barker.

Trover of
Pieces of
Ends of
Boards.

(6.) **I**N Arrest of Judgment, for that the Declaration was in Trover for *Quingentis peciis Intestinarum, Anglice* of Ends of Deal-Boards. Sir James Mountague. Pieces are of a very uncertain Signification; for that they might be Middle-pieces, or Side-pieces; and they might be of very uncertain Dimensions. *Palmer 393. Latch 216. Styles 247. 3 Keb. 113. 1 Keb. 124. 176.* Serjeant Darnel *cont.* Trover will lie for a Study of Books; and the Law does require to precise a Form in this Action, as it did in the Infancy of it; and if it was according to the common Acceptation, 'twould be very well. *Powell.* All Workmen call all those short Pieces, not being fit for Wainscoting, Flooring, &c. Ends; and this being a particular Term of Art amongst the House and Shop Joiners, and generally understood by Workmen, is a proper Denomination for all short Pieces: Had it been for *Peciis extremis* or *exterioribus*, it had not been so well; for these Words would not comprehend the Middle-Part. Adjudged good, *absente Holt.* But afterwards the Court gave a farther Day, when Judgment was affirmed by *Holt, &c.*

The Queen vers. Gunn.

Arrest of
Judgment in
an Indictment
of Perjury.]
2

(7.) **A**Rrest of Judgment in an Indictment of Perjury, before the Justices of Peace in *Norfolk*, for that it set forth, that a Fine was levied in the Court of Common Pleas *Westminster*, in the County of *Middlesex*; and that the Defendant perjur'd himself at *Theed* in the County aforesaid; which Mr. Serjeant *Weld* held, must relate to the last County named; and then the Justices of Peace for *Norfolk* could not have Jurisdiction; and this he said was the express Case of the *Queen* vers. *Rhodes*, adjudged about two Years ago in this Court. Sir James Mountague *cont.* and said, if it had been in Case of an Action, it would

heve

have been good: He took a Difference between the Counties being in the Margent, and in the Body of the Indictment, and where it is only by Way of Recital, and in the substantial Part of the Indictment. Serjeant Weld. If it can ever be construed bad, it shall never be taken otherwise in an Indictment. The Opinion of the Court was, that the Indictment was naught; *set adjour*. Afterwards Weld took another Exception; that Justices of the Peace have no Power, by their Commission, to take Indictments of Perjury and Barretry; but the Court doubted, and seemed afterwards of Opinion they might.

(8.) Powell said, there could not be a Nuisance to a Market or Franchise, but to a Highway, &c. 2. No Nuisance to a Fair, &c.

Serjeant T. Whitacre's Case.

(9.) IN the Case of a Mandamus to restore Serjeant Whitacre to the Recorderhip of Ipswich. These Cases were cited to shew that a Corporation by Prescription may have several Names by Reputation; as if they are called by one Name, tho' it is not exactly the right Name, yet if 'tis sufficient to describe the Persons, they must Answer the Writ. 6 Rep. 65, 66. 21 H. 6. 4. 10 Rep. 125. b. 9 Rep. 48. 38 H. 6. 33. Fitz. tit. 3. 457. 1 Cro. 416, 418. 2 Roll Abr. 136. One Reason for turning him out was, that he did not attend at their Sessions, after they were appointed. Telv. 116. A Difference betwixt Justices of the Peace, and of Oyer and Terminer & Gaol-delivery. Stat. 4 Ed. 3. 2 Leo. 117. 3 Cro. 90. Cont. C. J. Jones 51. 9 Co. 50. 2 Co. 155. Non Utere is a Forfeiture, Co. Lit. 223. Dyer 114. Serjeant Weld cited these Cases about Misnomers, 3 Cro. 338. Moor 233. 1 Roll Rep. 118. 1 Keb. 623. Mandamus to restore a Recorder. 2.

Hill.

Hill. Term. 1703.

4 Anna Regina in B.R.

Anonymus.

Copyholder
has only a
possessory
Property in
Timber-
Trees.
Vide post.
Mich. 5 Ann.
N. 3.

(1.) **H**OLT said, a Copyholder has only a possessory Property in Timber-Trees, which if sever'd from the Freehold by Tempest, or otherwise, the Property would be in the Lord. He said further, and so was the Opinion of the Court; that 'twould be a hard Custom for the Tenant to claim such Trees; for such Custom would be to give away the Property of the Lord; especially in this Case, which was occasioned by the Act of God. He also questioned if there could be such a Custom, as for a Copyholder to cut Timber; he having only a possessory Interest, by Reason of its being annexed to the Copyhold Land.

Private Cu-
stoms here
Cognizable,
&c.

(2.) This Court will upon a Writ of Error take judicial Notice of all private Customs in private Places; for they below are as much bound to proceed upon their Customs as the Judges here are upon the Common Law.

Lewis and Jones.

Trespass on
the Case.
Variance
cured by
Verdict.

(3.) **T**respass *sup' Casum*; the Jury finds him guilty of the Trespass *prædict'*, which Sir James Mountague excepted against, because 'twas a Variance; for that Trespass *prædict'* was Trespass in general. But Letchmere answered, this was helped by a Verdict, *quod concessum fuit*. Another Exception Sir James took, that by the Record it appeared

appeared that Damages were assessed by the Court, which would have been fatal, but that it appeared, by the Entry of the Judgment, that the Judgment mentioned the Damages and Costs assessed *per Juratores*; and then it went on *per Cur' prædict' modo & forma prædict'*, which the Court said was idle and mere Surplusage.

Jackson and Humphrys. Error.

(4.) **A**N Action of Escape. The Exception was, that it was not shewn, that the Party was in Custody at the Suit of the Plaintiff, at the Time of the Escape; and *Holt* said, they ought to have shewn that he was arrested and taken at the Suit of the Plaintiff, and then escaped. The like where a Man is in Custody before any Suit. A Charge of him in Custody is in Law an Arrest. *Dec* said, it was pleaded, that at the Time of the Escape a Plaintiff was levied in the Counter, whereby he was charged in Custody at the Suit of the Plaintiff. *Holt* said, *Charged* was a vulgar Expression, but not a legal one. A Person is not in Custody of the Sheriffs of *London* till he is brought into the Counter, and be before in the Custody of the Serjeants. *Holt*. A Man is not regularly in Custody, at the Suit of another, till a Writ is delivered to the Sheriff, and arrested; you cannot declare against a Man in Custody any where but in this Court: But a Process must go to the Officer to bring him to the Bar. A Plaintiff is in the Nature of an Original, but not of a *Capias*; and the declaring against a Man *in Custodia Mar'* is the special Custom of this Court. But a Plaintiff will not be sufficient to found an Escape upon till Process goes out to bring him in Custody, (*viz.*) to bring him into Court; for by the Plaintiff he is supposed to be at Large. *Powell* differ'd. *Adjorn'*. *Vide* 1 *Salk.* 273.

Error in a Judgment on an Escape.

(5.) A Motion for a Prohibition upon an *Affidavit*, because the Cause arose out of the Jurisdiction, *viz.* in the Isle of *Ely*. But *Powell* denied it; because the proper Way

No Prohibition till Plea to the Jurisdiction.

is to plead it, and if they refuse the Plea, then a Prohibition.

Post. p.
S. C.

Brown vers. Dyer.

Free-bench
of Copyhold.
Q. if Discent
is toll'd.

(6.) IF a Copyholder dies, and his Wife has her Free-bench, Q. if this excrement Estate do not so take away the Discent, as if the Son dies before the Estate actually comes to him, that then the next Heir to the Father shall claim; and if this will not make a Possession *fratris*, *u. infra Mich. 5 Annæ, N. 6.*

Admittance
implied.

(7.) Q. If a Lord receives Rent, or take a Fine before Admittance, if this will not amount to an Admittance? *u. post. Trin. 5 Annæ, N. 4.*

Writ of Error
superfedeas
all Proceedings.

(8.) A Writ of Error is a *Superfedeas* to all Proceedings on that Judgment. Debt on a Judgment will not lie here till the Record be brought here in Court. *Powell.* An Action of Debt will lie pending a Writ of Error. *Holt.* If an Escape be against a Sheriff, and Judgment thereon, and a Writ of Error is brought, and the first Judgment is reversed, the Party shall have an *Audita Querela*: All the Matter above is to be spoke to again next Term.

An Appeal of
Murder a-
gainst 3, all
may join in
Error.

(9.) Appeal of Murder brought against three Persons, and Judgment, they may join in a Writ of Error; and yet in Law they are several Judgments, (*viz.*) *et quilibet Eor' suspend' per Collum*, or they may have several Writs of Error, according to the Nature of the Case. But if there are several Judgments upon one Recognizance, and no joint Words, there 'twas doubted, if the Writ of Error ought to be several. *Note*; The proper Way is to have Judgment *secundum formam* of the Recognizance. Q. If a Judgment is several, and Costs joint, what Writ of Error is proper.

*No Prohibition
shall be granted
in the
Writ.*

(10.) *Per* —

(10.) *Per Cur'*. In Case of a Trespass, the Tort-feaser ought to tender *Amends sufficient* at his Peril; and there needs no previous Demand. But in case of an Estray, if the Owner comes and says, *tell me what is due to you and I will pay you*; this *Holt* said *prima facie* is a good Tender; for it lies only in the Privity of the Lord how much is due. And in this last Case, the Stray is no Trespass, but the Lord seises it in Right of his Franchise. *Co. Ent.* 170.

Tender.
In Trespass;
Tender must
be of suffici-
ent Amends;
cont. of an E-
stray.

(11.) *Holt* said, he never understood that Case in *Hob.* 129. In case of an Amerciament at a Court-Baron, the certain Sum need not be set by the Court, but it is enough if it be ascertained by the Afferors: And *Mr. Pengelly* said, many Authorities are otherwise.

Amerciament
at a Court-
Baron.

Easter Term, 1706.

5 Annæ Reginae in B. R.

Sir Charles Thorold vers. *Smith.*

(1.) THE Defendant being indebted to *Sir Charles* in 100*l.* *Sir Charles* sends his Servant to receive the Money; the Servant takes the Goldsmith's Note upon one *Johnson*, whereupon the Servant gives a Receipt to *Smith*; *Johnson* breaks within a Week after, and if this was a good Payment to *Sir Charles*, or if the Servant had pursued his Authority in taking a Note in lieu for Money, and had a Power to give a Receipt to discharge the Debt without receiving the Money, was the Question. *Holt.*

Servant sent
for Money;
takes a Note
on one who
fails, &c.

A Bill

Note.

A Bill is no Payment; but if a Man will give a Receipt, he by that accepts the Bill as Money, and Payment; and therefore upon the Receipt this Case turns. The principal Objection from the Bar was, that the Servant had not Authority to receive any Thing but Money, and consequently could not discharge the Debt upon receiving the Bill. *Powell* said, *Sir Charles* should have sent his Man back again the same Day to have dissented, else 'tis a Presumption his Master was acquainted with and acquiesced in what he had done, and this might have altered the Case; to which the Court agreed. *Sir Steven Evans's* Case, the Court said, differed from this Case, for *Sir Steven* became a Receiver to the Use of *Ward*. If a Man gives a Note to another upon a Goldsmith, and no Receipt, 'tis usual to have three Days as a convenient Time to receive it; and if the Goldsmith breaks in that Time, 'twill be no Payment. *Adjournatur. V. post. Trin. 5 Annæ, N. 6.*

Bromfeild vers. *Kirber*. Error.Common
causa Vici-
nagii.

(3.) Justification of a Trespass, *per* Custom of a Manor for Common of Vicinage. *Sir James Mountague* considered the Extent of the Word *Vicinus*. 2 *Inst.* upon the Statute of *Merton*. *F. N. B.* 127. *b.* 128. *a.* 22 *H.* 6. 89. *Dyer* 47. *b.* And argued, That no Common can be of this Kind unless between two Townships, Manors, &c. next adjoining; and not where there is intermediate Land; and that this Tort was originally nothing but an Excuse of Trespass. *Holt*. Common of Vicinage must be next adjoining. *Weld*. The Place is the same but by several Names. *Holt*. The Pleading makes it several, and not one intire Place. *Weld* said, the Verdict help'd the Pleading. *Holt*. The Place may be in several Manors. The Cattle may stray into the next Common by Reason of Vicinage; but they cannot go into a Third, which *Weld* said, would destroy all such Common. *Holt*. *Vicinus* is to another Purpose, and so expounded in 2 *Inst.* between Landlord and Tenant. *Powell*. This Sort of Com-

mon

mon must be in Nature of an Escape, and so an Excuse: For a Man cannot put in his Cattle in the Common of Vicinage originally but they must escape. They may enclose one against the other, if they will be at the Charge: It stands indifferent upon the Pleading, whether the Places were several or not, and so the Verdict helps, for there are but two Towns named. *Holt.* People ought to take Care to keep their Cattle under their own Inspection, and not let them stray beyond their Bounds. In Pleading this Kind of Common, it ought to be pleaded mutual. If a Man goes in the Common of Vicinage to drive his Cattle off into his own Common; (for he ought not to keep them in the Common of Vicinage;) he may justify this Trespass; but if they go into a third Common, such Excuse perhaps will not hold. *Powell.* The Verdict will help, for there is Common of Vicinage found, and but two Places tho' several Names, and they may lie in the same Waste. *Adjournatur.*

Brown vers. Dyer.

(4.) IN the Case of a Surrender to the Use of A. The Lands were found to be surrender'd into the Hands of the Lord himself in full Court; and that the Lord assessed a Fine upon the Surrendree, but never admitted him: Adjudged *per tot' Cur'*, That the Heir of the Surrendree had no Title; for that the Title of the Surrendree is wholly by the Copy of the Court-Roll, made from the Entry upon the Court-Roll, which before Admittance cannot be. But in Case of a Discent the Heir may surrender before Admittance, because he has a Title by Discent; but the Lord in this Case shall have a Fine. *V. ante Hill. 4 Anna, N. 1. Post. Mich. § Anna, N. 3.*

Surrender of Copyhold
sans admitta
of the Surrendree.

Keble vers. Hickringill.

(5.) THE Question was, if an Action upon the Case for Shooting at, Disturbing and scaring Wild Ducks from

Case:
For hindring
Wild Ducks
from coming
to a Decoy.

from a Decoy-Pond, without coming upon the Plaintiff's Soil, was such a Damage as to support this Action. Serjeant *Darnel*. Wild Ducks are not such Game as the Law takes Notice of; nor is a Decoy a Franchise, or comprehended within the Word *Royalty*, (which the Court said, signified a Free Warren;) but *Royalty* had no such signification; as is here claimed. Neither could a Lord of a Manor justify under a *Royalty* to fish, hunt or foul in another Man's Soil. *1 Jones 440. 1 Vent 122.* A Decoy is not a privileged Place, if it were, he must have it by Grant or Prescription. *F. N. B. 36, 37. 4. 3 Lev. 227.* There is only a possessory Property, so as to kill them when they are there.

Serj. *Broderick cont.* The Declaration is, that the Plaintiff was possessed of a Piece of Ground, whereupon a Decoy, &c. and that the Defendant *malitiose* intending to deprive him of the Benefit, came to the Pond-head, and there disturbed, &c. Verdict *pro* Plaintiff. The Court will intend an Entry upon his Ground though 'tis not laid in the Declaration; and saying he came to the Pond-head must be taken to be his Ground. A Man, while Things that are *Fera Naturæ* are upon his Ground or Soil, has such a possessory Property, that if one kills the Game, (tho' he does not enter) he shall have an Action of Trespass for entering his Ground. *Keil. 203.* And shall recover Damages for the Thing killed. *12 H. 8. 10.* If a Man puts up a Hare in my Ground, and follows it, and kills it in the Ground of J. S. yet I may take it. A Man has a Market and Right of Toll, if another disturb People coming to the Market, 'tis uncertain whether any Goods may be sold, and consequently no Ill, yet for the Possibility of Sale I may have an Action. A Man ought not so to use that which is his own, as to hurt the Property of another. Whenever there is Malice and Damage a Man may have an Action on the Case. *3 Keb. 753. and 1 Vent. 348.* *Holt* said, he was not satisfied with this Case. *Holt.* 'Tis agreed on all Hands, while the Ducks are in the Pond, the Plaintiff has a Property, and the Defendant was a Wrong-Doer to disturb him; but to intend he enter'd, or that he came upon his Ground, would be too material to intend,

intend, it being Trespafs. But suppose the Defendant had shot in his own Ground, if he had had Occasion to shoot, it would have been one Thing; but to shoot on Purpose to damage the Plaintiff is another Thing, and a Wrong; he likened it to the Case of a Market and Toll. It must be taken as 'tis found upon the Record; but 'tis found to be done *malitiose*, and so it appeared upon the Evidence. *Powel.* That every one has a Property of Things *Fere Nature rations soli*, A Man may have a Free Warren in another Man's Soil, which he has *ratione Privilegii*, and not *Soli*, for one Man may have a Privilege in another Man's Freehold. A Man may have such a Property in Hares, as if he put it up in his Ground, and courses and kills it in another Man's Ground, still the original Property is in him, and the Coursing is a Continuance of this Property. As this Case is, the Defendant has done an Injury to the Plaintiff's Property, for by frightening them away you have destroyed his Property.

Powis and Gould to the same Intent. A Man may lawfully shoot in his own Ground, as to kill Venison, &c. but not to destroy maliciously the Property of another. Adjourn'd, and to stand in the Paper till next Term. *Vide post.*

Queen and Truebody.

(6.) **M** *Andamui* to restore a Burges to his Freedom; but it appeared by the Return that he had abdicated the Corporation for above four Years last past; and that he had removed himself and Family fifteen Miles off, and that he had been summoned to attend, and did not; whereupon they discharged him; and held well. If a Man attends his Office, tho' he lives out of the Corporation, yet his Attendance upon the Office will be a sufficient Residence. *Powell* doubted, if a Man lives out of the Jurisdiction, whether they need summon him out of the Jurisdiction? It seems not. But if he voluntarily attends, he answers his Duty.

A Burgeship
abdicated, &c.

Brook vers. *Hustler*.

Amerciaments
at Leets.

(7.) **E**RROR out of the Common Pleas upon a Judgment in Debt, for an Amerciament in a Court-Leet; the Defendant made Default of Suit after a general Notice; and the Amerciament affeer'd. *Holt*. The Jury may amerce in a certain Sum if they will, and then there needs not an Affeerment; tho' the proper Way is *Ideo fit in Misericordia*, and then an Affeerment. *Pengelly* took an Exception, that the Court being uncertain when it will be held, (that is, where the Lord may hold it when he pleases,) a particular and convenient Notice ought to be given, when and where the Court is to be held. 32 or 22 Ed. 4. 27. b. 28. a. 3 Cro. 353, 555, 556. A general Notice in the Church is not Notice to incur a Forfeiture, unless a particular Custom for it.

Serjeant Cheshire cont. 'Tis found that due Notice was given, and this the Judge of Assise is supposed upon the Evidence to direct the Jury.

Holt. We cannot judge of the Notice, because you ought to have shewed particularly, that he was summoned to the Court at such Day and Place to be held. *Powell*. To take Advantage of a Forfeiture, Notice should be Personal, unless a particular Custom to the contrary. In antient Leets, personal Notice perhaps is not necessary; but Notice in Church and Market may be well. But otherwise where 'tis not an antient Leet. 1 Brown 166. *Winch* 987. Co. Ent. tit. Error, 280, 284. *adjournatur*.

Gouch vers. *Buxton*.

Scandal of a
Parson, Prohi-
bition, &c.

(8.) **O**N a Motion for a Prohibition; The Plaintiff in the Spiritual Court was a Parson, and the Defendant said to him these Words, *Thou art a Sauce-box, Sirrah! a Rascal and scoundrel Fellow, and wilt make an Affidavit to any Thing.*

Serjeant

Serjeant Weld. A Prohibition ought not to go; for to say a Man will swear any Thing, is a great Scandal, much more to say so of a Clergyman; and cited 2 Roll Abr. 197; 295. 1 Keb. 521. 2 Lutw. 153. 3 Lev. 17. 2 Keb. 439. March's Rep. 153.

Page cont. These Words import Matter of Heat, and not of Scandal; and only shewed the Opinion his Client had of him at that Time. Holt Ch. J. Suppose these Words in this Libel had been spoke of a Layman; could he have had an Action? no; then how the more for his being a Clergyman? for the Words do not touch him immediately in his Office. To say a Parson is a Rascal is no more than to call him Rascal. Powell. There is a Difference between defaming a Parson and a Layman, but then it ought to be something for which he may be drawn in Question in the Ecclesiastical Court. He said, he remembered a Case in the Common Pleas; for calling a Parson Pimp; and they would not grant a Prohibition; for that the Word Pimp had a common and known Signification; and the like in Calling a Layman so. In the first Words here, there is nothing scandalous; and then it adds, *you will make an Affidavit to any Thing*, this does not charge him with any Act which can draw him in to Question thereof. Powis. Here is no Colloquium of his Function, and the Words import only Heat. Suppose he had said, *you will murder a Man*, this is only the Opinion he had of him, &c. Gould. He remember'd the Word Pimp was adjudged to be one who procured Women. But he thought in this Case; take the whole together, they imported a great Scandal. And afterwards Powell desired Time to consider of it. For all the Books make a Difference between defaming a Parson and a Layman. Which Holt said he saw no Reason for; for the Characters and Consciences of other Men are as tender; and of as great Concern to them, as a Parson's. But Powell said, to call a Parson Knave, a Prohibition has been denied; but no Doubt but 'twill be granted in a Layman's Case. Adjournatur.

(9.) *Holt* said, let this be a general Rule of Court, That no special Imparances be, unless by Motion to the Court, and shew Reasons for them.

Writ of Error, a Superficial.

(10.) The Court doubted if Debt would lie upon a Judgment, pending a Writ of Error. See 1 *Leb.* 133. 1 *Sid.* 2 *Vent.* 261. *Holt* said, *Vaughan* was of a different Opinion from *Hale* in this Matter. *Et adjournatur*. But the Law seems now fix'd, That a Writ of Error stays all Proceedings whatsoever.

A general Non Dampnificatus to particular Assignments.

(11.) *Holt*. Bond to save harmless against several particular Things, and after in general; here to a general Declaration, *Non Dampnificatus* is a good Plea, and then the Plaintiff should shew a Breach; tho' perhaps 'tis better to answer to the particular Things, and then to say *quoad* the rest *non Dampnificatus*. *Cro. El.* 253. The Plaintiff should have assigned a particular Breach before he had demurr'd.

Vide post. *Trin.* 5 *Annæ*, N. 4. and *Mich.* 5 *Annæ*, N. 4. Libelling against the Ministry.

Queen vers. *Drake*.

(12.) Information that he wrote a scandalous Libel, intitled, *Mercurius Politicus*, in which is contained several libellous Matters *inter alia*, and set it forth *secundum tenorem sequentem*. A special Verdict, they find all but *Not* instead of *Nor*; 'twas *Nor* in the Record, and *Not* in the Paper. The principal Scandal Mr. Solicitor said was, That the late Revolution was the Destruction of the Laws of *England*. The Information being set forth *in hæc verba*, and there being a Variance, he said was the Objection from the other Side. But if the Substance was found, 'twas sufficient to make it a Libel, especially it being an immaterial Variance. For *Not* he said carried in it the same Sense as *Nor*. Therefore admitting it a Variance, 'tis an immaterial Variance. *Dyer* 75. *Sir John Bridges's Case*, *Cro. Jac.* 407. *Hob.* 180. 1 *Roll Rep.* 421. *Cro. El.* 503. A Man may declare for Words in *Latin* which were spoke in *English*, which shews that the Substance only is regarded by the Law. *Mr. Lutwich* cont. The Question is, if the Information is for

for the same Libel, 'tis said to be *secundum tenorem sequentium*; now the Word *Tener* is the Thing it self, and ought to be a true Copy of it. Reg. 169. 4. This Differs from the Laws of Words, because in this Case the Matter is reduced to Writing. In an Action upon the Case for a malicious Indictment, in the Declaration there should be no Variance, because they may have a Sight of the Record. So here, for they had the Book to guide them. Adjourned till next Term.

(13.) When a Person complains to this Court of a Misdemeanor, and 'tis adjudged his Complaint is vexatious; this Court will not allow the Privilege of protecting him returning.

to spiritual
Vexatious
Complaints
Page

Queen against Atkinson and others.

(14.) Indictment, the Defendants being Collectors of several Duties and Sums of Money, collected of A. B. not being assessed, and converted the same to their own Use; the Defendants demurred. Serjeant *Chebbure* excepted against their being joined in the Indictment; for that they ought to be severally indicted. 1 Vent. 302. 2 Roll Abr. 81. Holt. If it appears to be several Offences, there ought to be several Indictments. Powell. If two Men commit a Felony together, they may be jointly indicted. Holt. So if Men join in a Battery, they may both be joined, tho' two several Fines shall be set upon them; the like in an Indictment of Felony, but they shall severally have Judgment. It appeared both these Collectors received the Money jointly. Judgment against the Defendants. Gould said, had they not been guilty, they would never have demurred, but have taken Issue.

Fraud in Col-
lecting and
converting
Money.

Queen vers. Belwood.

(15.) Indictment: The Case was; a Justice of Peace had Power to commit to Ward, which is the Word in the Statute: The Justice committed one to the Gaoler

Permitting a
Prisoner to
go at Large

Gaoler of the County. And *per Cur'*, The Sheriff, and consequently his Gaoler, is the proper Officer; and if he let him go at Large, 'tis such an Offence as is proper for an Indictment.

Queen vers. The Clerk of the Peace of Cumberland.

Extortion of
Officers, &c.
Clerk of the
Peace.

(16.) *Certiorari* directed to the Justices of Cumberland.

Articles in Writing were exhibited to the Court there against the Clerk of the Peace, charging him with several Misdemeanors in the Execution of his Office. *Viz.* *Inter al'*, That he did exact of several People, and force them to pay more Money than his just Due and Fee; and upon due Consideration, and upon being heard by his Counsel, he was convicted and discharged of his Office.

Could. This is a good Conviction; the first Question is, if this Return is good in Form? The Crime is Extortion; and so 'tis expressed full in one Article; where there is a Charge of Extortion, it must be particularized. In the Premises there is Certainty enough; but if the *Viz.* is sufficient, is the Question; he held it to be certain enough. Another Question arose upon this Office being a Freehold; but then this Act of Parliament creates this Freehold, and also the Jurisdiction of the Justice of Peace as to it. The Words of the Statute are, *If he shall misdemean himself, and upon Examination thereof before them at their Sessions, upon Articles in Writing, and upon a Conviction, they may discharge him.* The *Viz.* in this Case connects the Charge and the Premises, and carries on the same Matter; sometimes a *Viz.* is absolutely void, as when 'tis repugnant to what goes before, but if it explains the Matter precedent, 'tis good to serve the preceding Purpose. 1 Saund. 169. 1 Vent. 107. 'Tis sufficient for Justices of the Peace, who are not so skilful as Lawyers, if they pursue the Substance of the Statute; and is not like the Case of Indictments, but rather like Orders.

Powis of the same Opinion. By *1 Will.* This is a good Order; when an Act of Parliament erects a Freehold, and erects a Judicature at the same Time; 'tis subject to be defeated and destroyed according to the Direction of the Act; and is like the Case of a Fellow of a College, who may be removed by his Visitor. *1 Vent.* 37. The *Viz.* incorporates the subsequent Charge with the precedent general Accusation; where the Words *in the Execution of his Office* are omitted, then the *Viz.* ought to say, that he committed the Offence in the Execution of his Office. The Word *That* would be Nonsense; were it not for the *Viz.* for the Charge is, That he committed divers Offences in the Execution of his Office, *viz. That he; &c.* Even in Indictments he said, he had found two Precedents strong to this Purpose, *West Pres. Sect. 97. of Videlicets;* and the same Book, *Sect. 130. 1 Sid.* 91. 'Twas objected, that in the Charge 'tis not said how much too much he had taken *Colore Officii;* but then he said, the Justices had adjudged, that he had taken 9 s. too much, more than was his Fee, *Colore Officii.* That being a Court of Judicature, they in open Court debated the Matter fully, and gave Judgment; and this Court ought to judge favourably, that they have proceeded regularly.

Powell Justice contra. This Removal and Return is not sufficiently certain; this is a Freehold, which the Law requires great Solemnity in Removing, and much different from Chattels. My Brother makes a Difference, that this is a new Freehold, but he could see no Difference betwixt a new and an old Freehold. 'Tis true; this Act of Parliament has created a new Way of Trial; but he could not agree with *Powis*, that a Trial in this Way was the properest, for a Trial by a Jury is the greatest Check and Security against Arbitrary, &c. But if this Removal pursues the Authority in the Act is the *Q.* In every Charge there ought to be something particularly charged. If a Man is indicted of divers Misdemeanors in his Office, *Viz. &c. Q.* if certain. If a Man is indicted for feloniously stealing divers Goods, *viz. that he took a Coat, &c.* why this would not be good without the *felonice Cepit & asportavit* to every one.

This ought to be construed as in Indictments, especially since his Freehold is concerned, and therefore it ought to be exactly certain: He said in the Charge it did not appear that what he took was more than his Fee; and the Adjudication will not help this Defect, for they ought to judge upon the Charge. *Hutton* 9. 3 *Leo.* 168. He would in this Case take all Things strictly, and the Act of Parliament says Misdemeanors, but here is but only one single Act and Charge.

Holt Ch. J. This Order ought to be quashed. He considered two Things: *First*, This Charge ought to be certain; that in Case of an Appeal it may appear whether the Matter they proceeded upon was sufficient in it self, and certain. This Case did not differ from an Information. Must a Man lose his Freehold because Justices of Peace are not skillful, (or honest, as *Powis* said.) The Justices are not to draw the Articles, but to judge of them; 'tis a common Right due to every Man not to lose his Right, without sufficient Certainty; it ought to appear to the Court to be a Misdemeanor in the actual Execution of his Office; for it says the Clerk did compel him to pay so much, but it does not say to him, nor that it was *Colore Officii, extorsive, &c.* Extortion is a specifick Offence, and is as necessary to be set forth as *Felonice* in an Indictment. Again he said, he took 10s. more than his Fee; why, this may be, for perhaps he had another Demand upon him. *Secondly*, 'tis the Collection of the Justices, by Way of Inference, that from the whole he is guilty; but that the Justices cannot do, for here is no Charge; but they have concluded from the Premisses, and not from the Charge, for the Charge does not affect him; for when it comes to the *Viz.* there was no Charge before. Afterwards upon looking into the Statute, it appeared to be Misdemeanor in the singular Number. But the Court remained still divided *as supra.*

Trin.

Trin. Term, 1706.

5 Anne Regiæ in B.R.

Willimot against the Chancellor of Worcester.

(i.) **P**rohibition. The Case was; Willimot commits Incest in Worcester Diocese; and about two Years after removed his Habitation into the Diocese of York; and coming to the Election of Parliament Men, this Citation was served upon him in the Diocese of Worcester; he appears by Proxy, and pleads, that he lived in the Diocese of York, and subject to the Jurisdiction of York, & *nullo modo, &c.* The Plaintiff was excommunicated: Dr. Floyd. 'Tis the Practice of their Court to call the Person personally to appear; for the Citation was *pro salute animæ*, and that cannot be done by Proxy or Counsel: No Criminal can appear by Proxy, neither ought he to have pleaded so contumacious a Plea, but he ought to have made his Appearance, with a Saving to himself all Benefit of Exception; for *prima facie* there is a good Jurisdiction to call him to answer, and then he ought to make Protestation *de non Consentiendo nisi de Jure, &c.* The Roman Senators had a Privilege of being tried only in their Superior Courts; but if a Senator had committed a base Crime, he thereby had so debased himself, as that he should be subject to the Jurisdiction he had offended. The Statute of Citations extends not to Criminal Suits, but only betwixt Party and Party. Dr. Lamb. The former Practice to appear personally in Criminal Prosecutions, was founded upon the Power the Court had to make him answer upon his Oath, which

An Inhabitant of York first excommunicated in Worcester Diocese.

which is now taken away by the Statute. A Man, that removes his Habitation; must not be said to run away from their Jurisdiction. The Pope, by his usurped Authority, delegated to the Archbishop of *Canterbury* a Power to cite a Man out of his Diocese, which by the Statute is now gone. *Holt* said, this Citation was originally wrong; 'twas against the Statute; and granted a Prohibition, that so they might plead to it, or demur; and so the Point might be settled solemnly, being a Case of great Consequence.

Special Verdict amended in a criminal Prosecution.

(2.) The Court were of Opinion the Entry of a special Verdict, tho' in a Criminal Prosecution, may be amended, if 'twas not enter'd according to the Notes taken; And the Roll may be amended. *Gould* cited *Raymond* 460. and said, the Court frequently amended Informations. Q. If the Court would amend in a Case where they had not the Minutes there. *Per Cur'*, If the Notes and the Verdict vary, the Court will amend according to the Notes, else not. *Per Cur'*, If a Jury find for the Queen, and the Verdict is entered for the Defendant, yet at Common Law 'tis amendable; and it was agreed in *Dr. Drake's Case*. If in a special Verdict, the Clerk takes the Minutes right, and the Verdict is enter'd up wrong, the Court will amend the Roll according to the Minutes, tho' in a Criminal Prosecution. *Vide infra*.

Paupers dispaupered.

(3.) 'Tis a singular Favour to admit a Defendant a Pauper; but if such Defendant will plead a dilatory Plea, the Court will dispauper him.

Vide ante
Pasch. 5 Ann.
N. 15.
Post. Mich.
5 Annæ, N. 4.
Variance.

Queen vers. Dr. Drake.

(4.) A Attorney General took this Difference, that this was only a literal Variation, and made nothing in the Sense; and if this was to be allowed, no Criminal would be punished: For Suppose in the Libel the Word *Though* was in the Information wrote *Tho'*, this would be the same Objection. As to the Objection of *secundum tenor'* sequen',

sequent', this is not meant to be a literal setting forth, but a substantial one; as according to the Tenor of the Deed is according to the Substance of it: Even the setting forth *in hæc verba* must be only in setting forth the Substance. 5 Co. Long's Case, which he made use of to this Purpose; that if such Certainty was required, the Effect would be only to confound all Certainty, according to the Rule there mentioned *Nimia certitudo certitudinem confundit*. Suppose in a *Certiorari* to remove a Record, would any Man say, if such a Variance was, the Record was not well removed. *Dyer* fo. 75. *Allen* fo. 30. Where in Actions for Words 'tis laid *in hæc verba*, *Dyer* 119. *Roll Rep.* 422. 2 *Roll Abr.* 717, 724. 7 H. 6. 27. *Telv.* 46. *Cro. Jac.* 32. *Styles* 344. 3 Co. 2. these Cases he offered to shew, that the Law required Substance and not Form. If it had been a material Variance, yet as this is laid 'twill be yet well; for the Information is, that in that Paper is contained divers scandalous and seditious Matter; this Matter in which the Variance is, is not the Matter complained of, for that was not a Scandal; and the Information is not for any Thing in which there is no Hurt. *Branthwait cont.* If Words have a doubtful Signification, the Court will construe them in the best Sense. The Word *Nor* is a different Word from *Not*, the latter being a direct Negative, the former is only a Word of Relation, it refers to something else.

Holt. Ch. J. An Information for a Libel may set forth the Libel in *Latin*; neither ought the whole to be set forth, but only that which is libellous in it self: And then at the Trial, if it appears upon Evidence, that the Words abstracted from the whole Book are not libellous, the Defendant must be acquitted; the Words *Nor* and *Not* have a grammatical Variation, he seemed to rely much upon the Case of *King and Bear*, 12 W. 3. Adjourn'd till next Term.

2 Queen

Queen vers. Dr. Brown.

Libel against
the Ministry.

(5.) Information was brought to have Judgment for a Libel, called, *The Country Parson's Advice to my Lord Keeper*. The Judgment was regularly signed, but the Defendant did not move in Arrest of Judgment within the four Days; and the Court doubted whether they could hear Counsel, this being in a Criminal Cause, the Court ordered Counsel to speak to this Point. But afterwards the Attorney General consented they should take their Exceptions.

Branshaw excepted, that this did not import a Scandal, but in their natural Signification carry a Credit, as to be wise as Somerset, &c. Suppose an Indictment for a Nuisance, which in it self is so, 'tis enough to say so generally; but if it is only a Nuisance, as 'tis accompanied with Circumstances, there it ought to be particularly set out; as for building an Inn; or to build an Inn *ad Commune nocumentum*, is not good, &c. 2 Roll Rep. 345, so here the Manner of Speaking ought to be set out, *Holt*. An Information will lie for speaking ironically. And Mr. Attorney said, 'twas laid to be wrote *Ironice*, and he ought to have shewed at the Trial that he did not intend to scandalize them; and the Jury are Judges *quo animo* this was done, and they have found the ill Intent.

Judgment of the Pillory, and Fine of forty Marks.

Lord Kingsale vers. Compton.

Venire tested
by Award,
before Issue
joined.

(6.) Record of Trinity Term, an Award upon the Roll to try the Issue returnable such a Day; Error, that the *Venire* bore *Teste* before Issue joined. Where the Award upon the Roll is wrong, the Statute of *Jeofails* will not extend to it. *Powell*. The Statutes of *Jeofails* will not help the erroneous Award of the Court. This was a Writ of Error, and the Error assigned was, That the Record was of Trinity Term, the *Venire* was awarded

returnable

returnable *Craftino Trin'*, which was before the Term; now this being a wrong Award of the Court, it must be intended returnable the Year after, which is an erroneous Award of the Court, and then there is nothing to award the Writ by, the Roll being wrong. The Court seemed to be of Opinion, that this was Error, and not help'd by the Statutes of *Jeofails*. *Sed adjournatur*.

Sir Charles Thorold vers. Smith.

Vide ante
Pasch. 5 Ann.
N. 1.

(7.) *Serjeant Darnel*. A Receipt shall not be a good Discharge, where a Servant had not a special Authority to give a Receipt. 10 H. 7. 9. 4 H. 6. 1. 40 Lib. Ass. 38. Suppose a Servant gives a Receipt, and does not receive the Money, shall this bind the Master; so if he takes any collateral Security, as a Bond.

Receipt by
Servant, where
good sans
special Au-
thority.

Mr. Eyres. The Question is, if a Servant is sent by his Master for Money, if he receives any Thing else in lieu of Money, whether this is a Pursuance of his Authority. It did not appear in this Case, that Sir Charles had any Notice of the Receipt of the Bills, nor of *Johnson's* Breaking; but the Servant sent the Note back upon hearing of *Johnson's* breaking. A Servant sent by his Master to receive Money, cannot release or discharge his Master's Debt, without receiving the Money; for a Receiver has no Power to make any Commutation, without a special Authority. *Dr. & Stud.* 138. b.

Sir James Mountague cont. The Authorities cited from the old Books will not weigh much in this Case; for the Way of Trade and Commerce is of a quite different Nature now. *Holt*. A Bill of Exchange or Goldsmith's Note is not Payment, unless the Party omits receiving of it in a reasonable Time, as three Days, when he might have received it; but if he gives a Receipt and accepts the Note as Payment, this shall bind him. In this Case Sir Charles himself gave no Receipt, but the Servant. Where a Man has Authority to receive Money, he cannot receive any Thing else. 'Tis common Practice, if a Man receives a Goldsmith's

Goldsmith's Note, and gives a Receipt, 'tis purchasing the Bill. In this Case, it must be understood according to the Course of the World and Trade; that this Servant had a general Authority to do what his Master would have done; this Case differs much from the Case of a Servant or Attorney to one particular Purpose, but this is in Nature of a Factor &c.

Powell Justice. No Modern Practice will alter the old Law; the Party himself may give a Receipt, but a General Receiver cannot receive any Thing else. His own Acquittance would stop him, but his Servant's Receipt will not. In this Case the Servant was sent to receive Money: This Servant he supposed had many Times received Bills for his Master, and this is an Authority to this Purpose; but this indeed was proper Matter of Evidence, being the constant Practice of the World; and had this not been, Sir Charles would have asked his Servant what he had done; and when he had told him he had received such a Note, 'tis a strong Presumption his Master approved of it, or else, 'tis to be presumed, he would have sent it back again. *Adjournatur.* *Holt* thought this was more Matter of Evidence than Law; and any Jury at *Guildhall* would find Payment by a Bill to be a good Payment, it being the common Practice of the City. And he proposed a new Trial; Whether the Servant had Power to receive a Bill, and give a Receipt; which was agreed to. *Holt.* In this Case, the Receipt of a Servant that has Power, is the Receipt of the Master.

Andrews vers. *Strowd.*

Settlement to
Husband and
Wife for Life,
Remainder to
Trustees for
Years.

(8.) THE Case was this: A Settlement to Husband and Wife for Life, and if he dies without Issue Male living, or *in Ventre sa mere* at the Time of his Death; a Remainder to Trustees for 500 Years to raise Daughters Portions; the Husband dies, leaving Issue Male at the Time of his Death; which Issue Male soon after died without Issue Male; the Wife dies; the Question was, if this Term should rise up again for the Benefit of the Daughters?

Daughters? The Opinion and Judgment of the Court was, that it should not, it being a Condition precedent, and not a Remainder upon the Determination of the Estate-tail. This Judgment was reversed in the House of Lords, upon the Reasoning that Mr. Raymond urged, viz. That the Time of his Death related only to the *Ventre sa mere*; and then 'twas no more than an usual Limitation; For the Wife was not *Ensient*.

(9.) Raymond objected, that this Court could not reverse a Judgment given in another Court, unless they could give the same Judgment the other Court should have given; which in this Case cannot be, because the Plaintiff in the original Action was dead, and the Court cannot give Judgment for a dead Man. He as Executor might have an Action for *bonis asportatis in Vita testatoris*, but that is by the Stat. E. 3. *Holt*. If this Court cannot give the same Judgment as the Court below should have given, tis because the Suit by the Death of the Plaintiff there is abated: But this Court will reverse the Judgment, which otherwise would be a perpetual Bar; and by the Reversal the Executor is restored to his Action.

Q. If B. R. can give Judgment where the Inferior Court could not.

(10.) *Per Cur'*: If a Man's Estate is of such a Nature, as that the Commissioners cannot assess a certain Tax upon every Man, as in the Case of Common, &c. they ought not to meddle with it. See *Hill. 7 Annæ, N. 7.*

Commissioners of Taxes.

(11.) Where the Plaintiff in Error is Nonsuit, or where Judgment is affirmed, or a Discontinuance, there Costs shall be allowed, but no Costs where he is barr'd.

Costs on Discontinuance, &c.

Henly vers. Welch.

(12.) **H**OLT cited these Cases to shew, that in Case of an Estray, the Lord ought to make a Demand of what the Amends ought to be for the Keeping; and then, if the Party thinks the Demand unreasonable, he

Tender of Amends for keeping an Estray, &c.

A a

ought

ought to tender sufficient Amends; but if he tender insufficient Amends, the Lord ought to take Issue, and let the Jury settle what the Keeping is worth. *Noy* 144. *Godb.* 150. *Note*; In this Case the Action was brought for an Estray Colt; and by the Replication it appeared, that 'twas after the Year, and then it ceas'd to be an Estray, and became the Lord's Property. *Holt.* It became an Estray after the first Proclamation, and not sooner; the Owner is subject to pay for no more than a Year's keeping, which shall commence from the Seizure. *Powell.* The Pleading a Tender of sufficient Amends is well, and a good Issue.

Devise of all
his Lands and
Hereditaments makes
a Fee.

(13.) *Serjeant Weld.* The Question arose upon a Devise to one of all his Lands and Hereditaments. 'Tis true, the Intent of the Party shall be supported if possible; as *John a Stiles* shall be my Heir, this carries a plain Intent that the Devisee shall stand *in loco* of the Heir; so a Devise to one for ever; and this is agreeable to the Law, for a Release of all his Estate will extinguish the Right. The Word *Hereditament* is a common Word, and 'tis here accompanied with other Words; 'tis a Word frequently inserted in Conveyances; even in a Lease for Years, nay, 'tis so commonly put into Leases, that People scarce think it safe without it. Now the Intent of the Devisor does no where appear to carry the Interest, nor will this Word bear such a Construction. 'Tis true, the Word *Hereditas* does imply the Interest, but the Word *Hereditament* is the Thing it self, *viz.* the Land. *Spelm. Gloss.* 203. The Word *Hereditament* signifies not only what a Man has by Descent, but also what he has by Purchase: If a Man has only an Estate for Life, if he gives all his Hereditaments for Years, why this will pass. *Moor* 373. *Hob.* 2. 2 *Saund.* 1 *Vent.* 299. Tenant for Life of Lands levies a Fine with Warranty, the Warranty descends upon him in Reversion. No Body will say, but if Tenant for Life levy a Fine, he in Reversion might have enter'd for the Forfeiture. Where a Warranty extinguishes a Right, a Release of that Warranty will set it up again. The Pleading a Rebutter

shews

shews it does not give a Right: For the Conclusion is not Judgment *fi Actio*, but is by Estoppel. *Fitz. tit. Droit 29.* If a Man covenants to make further Conveyance, a Man is not bound to convey with Warranty, because 'tis no Conveyance, but only a Bar. 1 *Roll Rep.* 71. *Raym.* 190. No Doubt a Warranty, so long as it accompanies the Land, is a good Defence.

Mr. Gilbert. As to the Objection, The Word *Hereditament* being mingled with other Words, *Lands and Tenements*, the Court will not intend, when People are conveying their Rights, that Words are used for tautology. 1 *Roll Abr.* 834. The Statute of Limitations cannot be given in Evidence, where the *Mise* is joined upon the meet Right.

Holt. The Word *Hereditament* signifies the Land in which I have an Estate of Inheritance. If a Man leased all his *Hereditaments* in D. this will carry all whereof he has an Inheritance, and all Freeholds, &c. *Powell.* *Hereditament* describes the Thing of which an Estate of Inheritance may be; and carries that which Lands or Tenements will not do, &c. as Common, &c. And the Pleading is *quod Clamat ut Jus & Hereditament' suum.* See the Case in *Vent.* 299. He said, he did not go upon the Word *Hereditament*, but the Word *Interest.* In this Case he said, the perpetual Charge went a great Way to carry a Fee, and the personal Estate will not be liable, but the Charge shall rise out of the Land which is permanent.

(14.) Holt. See *Bulstrode* 163. Father Tenant for Life, Remainder to his Wife, Remainder to his first Son in Tail; the Son is at Age, the Father makes a Feoffment in Fee with Warranty, and takes back an Estate to him and his Wife; the Husband dies, the Wife is remitted, but the Collateral Warranty binds the Son, for he is not remitted.

(15.) Holt. If a Legacy is given, or a Sum of Money in Gross devised out of Lands, he doubted not but an Action of Debt might be brought for that Money; tho' such Action never as yet had been brought; and that he doubted

Debt for Money devised as a Legacy.

doubted not but that it might be brought upon the Statute of *H. 8.* For whenever a Statute gives a Right, it must by necessary consequence give a Remedy: And the proper Remedy in such Case is *Debt*, which may be founded on that Statute.

Debt or Account for Money delivered to buy Goods.
2

(16.) *Powell.* If I give Money to another to buy Goods for me, and he neglects to buy them, for this Breach of Trust, I shall have Election to bring Debt or Account; and cited four or five Cases. *Holt cont.* If the Party did not take it as a Debt, but *ad Computandum*, or *ad Merchandizandum*, it must be an Account, and he shall have the Benefit of an Accountant; which is, he may plead being robbed, which shall be a good Plea in the last Case, and not in the first. Adjourned. See 2 *Lev. 5.*

Declaration not amendable on Payment of Costs.

(17.) *Per Curiam.* Altho' a Cause has proceeded no farther than in Paper, yet if the Time is out for the Entering it up upon the Record; this Court will not give Leave, upon Motion to amend the Declaration, upon paying Costs. Let them declare *de novo.*

Foreign Usances to be shewn in the Declaration.

(18.) *Note;* About this Time an *Assumpsit* was brought by one *Bulkley v. Camden*, on a Foreign Bill of Exchange, to pay according to the Custom of Merchants so much Money, at two Usances, viz. at *Amsterdam*; but it did not appear what the Time of those Usances was. *Holt. Ch. J.* said, he would take Notice of the Custom of Merchants here, but not of that at *Amsterdam* or *Venice*, &c. In such Case, you must set forth the Custom in your Declaration.

Mich.

Mich. Term. 1706.

§ *Annæ Reginæ in B. R.*

Hacket vers. Tilly.

(1.) **D**EBT upon a Bond conditioned to save harmless against any Actions brought for any Escapes. Bond to save harmless against Escapes.

A Difference was taken between a general Condition and a Condition only to save harmless against Escapes suffered by the Party himself. And then a Construction of Words shall be according to the Intent of the Parties.

1 Lev. 63. Yelv. 197. Hob. 14. Dyer 306. Owen 100. Dyer 17. A Condition shall be intended for the Benefit of the Obligor, and is in Nature of a Defeasance; *aliter* if the Bond had been single. For Construction of Conditions, see Hob. 304. Hut. 40. 18 Ed. 4. 28. 1 Roll Abr. 417. A Bond conditioned to commit Maintenance is void. 2 Leo. 107. Moor 186. 10 Co. 101.

Holt. A Bond to save a Man harmless from an unlawful Act already done, is not void, but is an Undertaking to bring him off: There is a Difference between saving a Man harmless from an Action, and a Judgment. For in saving him harmless from an Action, he must take Care it does not go to Judgment; for then 'tis no longer an Action. *Sed Q.* If not the necessary Consequence of an Action? and so within the Condition. *Powell.* If a Gaoler takes a Bond from a Servant, to save him harmless from all Escapes to be suffered by the Servant, 'tis good. A Condition may be good for Part, and void for Part; but a

B. b.

Condition

Condition against a Statute, if 'tis void in Part, 'tis void in the whole. See the Stat. 23 H. 6. c. 10. 10 Co. 101. 11 Co. 53.

Lord Banbury's Case.

Mistakenly a-
voids both
Judgment
and Execu-
tion.

(2.) **M**Otion to set aside a Judgment irregularly enter'd up, and to set aside the Execution thereon. *Charles Earl of Banbury* gave a Warrant of Attorney to enter up Judgment by that Name, but the Plaintiff entered it up by the Name of *Charles Knowles Esq;* It appeared that the Bond was by the Name of *Charles Earl of Banbury, &c.* The Court set it aside; but said, if a Nobleman will admit himself to have a wrong Name, so that it cannot appear to the Court that he is a Peer, he shall not after say he is a Peer, and so to alter the Nature of the Execution.

Vide ante
Hill. 4 Anne,
N. 1.
Forfeiture of
Copyholds.

(3.) *Mr. Salkeld* cited the Cases following, as to Copyholders forfeiting their Estates by exceeding their Authority; as for a Tenant for Life trespassing upon the Inheritance, by cutting Timber. *Noy* 29. 1 *Vem.* 123, 163. 1 *Bullst.* 1 *Jones* *Hutton* 102. *Hethy* 5. He compared the Case of a Copyholder to the Case of Tenant at Will; viz. That which could be a Determination of the Will at Common Law, is a Forfeiture of his Copyhold.

Mr. Eyres. Tenant for Life lays a Custom for all Windfalls of Timber; a void Custom, being a greater than belongs to his Estate. This is a Custom to take away that Right from the Lord which the Law gives him, without any particular Reason to enlarge his Privilege further than the Nature of his Estate allowed. *Moor* 8. *Fitz.* tit. *Devise* 12. A Custom for a Feme Covert to devise is void; for that she has no Property. 1 *Sid.* 161. *Winch* 8. Where a Custom is for the Benefit of the Estate, there a Custom to Charge it may be good; because of the Consideration of the Benefit. Their being blown down by Tempest, without the Default of the Servant, shall excuse him from a Forfeiture of his Estate; but why for this shall the Lord

lose

lose his Property; for before they were blown down, the Property was in the Lord, &c. Godb. 234. This is a Privilege too great for the Estate of the Copyholder for Life, and so a void Custom. Mr. King. 'Tis not unreasonable, that at the original Grant there might be a special Agreement between Lord and Tenant, that he should not be liable to be enter'd upon when any such Accident happened; and in Consideration thereof, he might possibly promise to plant young Trees, or do some other Act, &c.

Holt. 'Tis agreed, a Copyholder has a possessory Property, and when his Possession is gone, his Property is gone; now shall the Severance transfer the Property, &c. Powell. Suppose a Custom, If the House fall, the Materials should be the Tenant's, could that be good? Again, shall the Act of God do a Wrong to the Lord? Frank-bank was to encourage the Tenant to go into the Wars; if they were killed, the Lord would not take the Benefit, but gave the Estate to the Wife, to encourage them to fight; and this Powell thought was the Original of Frank-bank.

Queen vers. Dr. Drake.

(4.) GOULD. As to the two Points; First, Whether this be a Libel: He was of Opinion the Words were a Libel. Secondly, If there be such a Variance between *Not* and *Nor*, as to make it a material Variance. 1. This is the Case of a Libel founded upon a Writing, and not like the Cases of Words; for there 'tis sufficient to find Words to be actionable. Reg. 169. 2 Cro. 407. Dyer 75. 2. The Words are materially different; for the one is a Negative Copulative, and the other has a different Sense. There is a Difference between an Action founded upon a Deed, as Debt upon a Bond; there, if there be a Variance, one may plead *Non est factum*; not so here. So he concluded that Judgment ought to be for the Defendant.

Powell. 'Tis a Libel, and a very virulent one. And this Variance is a meer Slip, but such an one as will occasion a Judgment for the Defendant. *Not* may begin a Sentence, but

Vide ante
Pasch. 5 Annæ,
N. 15. and
Trin. 5 Annæ,
N. 8.

Variance between
Not and
Nor.

but *Nor* cannot; it is a Relative, and of another Part of Speech. If the Court was not to stop at a Word, where would be the *Ne plus ultra*. *Hob.* 179. *Telv.* 46. 1 *Roll* 2 *Cro.* 408. *Obj.* In Declarations for Words, you say *in hac verba Anglicana sequent'*. *viz.* which is as strict as *secundum tenor'* *sequent'*. *Answ.* Words are *quasi* in the Air, but *literæ scriptæ manent*. Again, in an Action the Scandal is the Matter; here, the *Writing*, &c. *Cro. Car.* 328. 11 *Rep.* 131. The Word *Tenor* is by constant Usage become a Law Term; and is to be an exact Copy, according to the Case of *The King and Bear.* *Reg.* 169. 1 *Sid.* 155.

Tenor quid.

Powell. The Consequence might be ill, in giving a Loose in such Cases as these; tho' the Difference seems small and trifling; for if Judges have such a Power, it may be carried to Cases of Treason, and endanger Mens Lives by Inferences. The Books are full of the Learning of Variance material and immaterial; but you do not count there upon the *Tenor*, but upon the Record in general, as in Words, &c. *Ad effectum* is not good. In Law there cannot be a *Tenor* of Words; for there is no Original to compare the *Tenor* by; for the Words remain only in the *Idea* of the Mind. 7 *H.* 6. 18, 19. If the *Tenor* be a Copy, which must be intended a true Copy, then how can the *Tenor* admit of a Variance, be it material or immaterial? A Man may declare for more, but if the Jury find the very Words that are actionable, 'tis good. *Dyer* 76. He thought the Case of Sir *John Sidenham* a little shaken. *Cro. El.* 503. In *Car.* II's Time there was an Act, that to say the King was a Papist, a *Premunire* should be incur'd: Suppose a Man had been indicted, and a Jury found, that he said he believed the King to be a Papist, he could not have been found guilty; for to say I believe a Man a Papist, is not so much as to affirm him to be one; for the later implies a Knowledge of his own. He thought it not proper to extend Cases of this Kind, for Fear of the dangerous Consequences; and that Judgment should be for the Defendant.

Note.

Holt. The Question is, if this is such a Variance from the Information as to make him Not guilty, &c. 'Tis such a Variance. 1st, If a Libel be set forth in these *English* Words,

Words, a Variance spoils the whole Information. Secondly, The Tenor is the same as if it had said *in hiis Anglicanis verbis*. 5 Co. 53. 2 Saund. 1121. If it had been in *Latin* it had been good; because the Matter and Substance is described in the Form in that Case; but in this Case 'tis distinguished from any other Matter and Thing, by the Description and by the Words, *Secundum tenorem sequens*. Dyer 203. No Difference 'twixt transient Actions founded on Wrong, and Words; for Words are an Injury. Suppose the Jury had found no Title to the Libel, whereas the Attorney had set it forth and described it with a Title, it had been naught. What Rule shall the Court be guided by? 'tis true, the Difference is trifling, but where shall we stop, if we begin to allow of any Variations in such Cases. Note; 2 Cro. 32. Telu. 152. were cited for Declarations in Words for more than is found.

Judgment *pro Def*, but a Writ of Error intended.

Queen vers. Smith.

(5.) THE Defendant was in Execution in *Newgate*, at the Suit of the Queen, *viz.* upon an Extent, and 'twas moved, that this Court would grant a *Hab' Cor* to bring him here, that the Bail might discharge themselves; but this Motion was strenuously opposed by the Attorney General; For that the Queen by her Prerogative should have the Election of her Gaol; and if he came here, 'twas only in order to be turned over to the Marshal, which he insisted on the Court could not do: But the Court seemed inclinable to give the Bail an Opportunity to surrender him, and to commit him to the Marshal, as well for the Queen as the Party. 1 Cro. 389. Dyer 297. And accordingly the Court did turn him over for this, and for all other Actions for which the Plaintiff might declare against him in this Court.

The Queen's Debtor in *Newgate*; turned over to the Marshal.

C e *Brown*

Vide ant.
Hill. 4 Annæ,
N. 7. Pasch.
5 Annæ, N. 4.
Pasch. Hill. 5
Annæ, N. 5.
Customary
Discent to
the younger
Son. 2. If
the Wife's E-
state for Life
shall break the
Discent to the
Elder.

Brown vers. *Dyer*.

(6.) **Ejectment.** *Dyer*. Seised in Fee according to the Custom, which is for Lands to descend to the younger Son, and the Wife to have an Estate during her Life. The Father had Issue a Son by one Venter, and another by another Venter; the Father dies; the Wife enters, and then the youngest Son dies without Issue. 1. Whether the intermediate Estate of the Wife so broke the Descent from the younger Son, as to make the elder Son of the Half Blood to the younger, incapable of Inheriting.

Raymond. This is no more than if the younger Son had never been born; and the elder shall make his Title from his Father, without taking Notice of the Brother. *Cro. Car.* 410. *W. Jones* 361. Where a Custom does not provide for collateral Matters, it shall be guided by Common Law. 4 *Co.* 92. *Moor* 121. 1 *And.* 31. The Estate of the Wife is a Continuance of the Estate of the Husband. 1 *Lev.* 172. 1 *Sid.* 267. If that Case in *Lev.* be Law, 'tis this very Case: And in this Case, there is no Title found for the Defendant, then the Possession is a Right against all except him that has the meer Right. *Eyres cons.* 'Tis true, the Possession is found in the Plaintiff, but that was not intended to be insisted on, but the very Title: Besides in this Case the Court will allow of an Amendment. But then *Holt* said, you must go before the Judge that tried the Cause. Two Things ought to be found; the Ancestor's dying seised, and that this was the youngest Son. *Holt*. Suppose he has but one Son, then he shall take by the Common Law. The Ancestor must die seised, and there must be a younger Son; and should the Ancestor be disseised, and die, the Right would descend to the eldest. Whenever a Right of Inheritance is vested, the Defendants shall take *Jure Representationis*. 1 *Roll. Abr.* 623. In this Case the Father surrendered in Tail, and the Heir was admitted generally in Fee; but this Admittance shall relate to the Surrender which bound the Land. *Moor* 29.

1 Roll Abr. 504. 2 Cro. 100. 1 Inst. 59. 4 Co. 22, 23, 28.
2 Roll 383. The Heir is a compleat Copyholder before
Admittance; and his Possession will make a *Possessio Fructu-
aris*. *Raymond*. Perhaps the Minute Book may warrant
the Amendment; where the Custom is not exprefs, there
the Common Law shall guide; and there, if there is but
one Son, the Common Law shall have the Preference, and
he shall take by it; which is an Establishment of this As-
sertion, that collateral Matters shall be guided by the Com-
mon Law.

Holt. If a Man surrenders his Estate to the Use of him-
self in Tail, and dies, the Heir has two Rights in him,
either to be admitted in Fee or in Tail. *Powell*. This cus-
tomary Estate for Life he compared to the Case of the
Freehold, which hindered the Discent of the Demean and
Freehold. And the Court seemed to incline strongly to
construe the Discent according to the Common Law. *Holt*.
If the Father be disseised and dies; in *Bur' Engl'*, the Right
is in the youngest Son; yet at least the Heir shall enter, and
then the younger Son shall re-enter. If a Rent-Charge be
granted *de novo* out of Land in *Kent* or *Burrough English*,
the Rent shall descend according to the Land. *Adjorn*.

7. An Action upon the Case was brought for dispersing
a Paper, accusing of a Gentleman, that he should say, *He*
could see no Probability of the Wars ending with France, 'till
the little Gentleman on the other Side the Water was restored
to his Right, Innuendo, the Prince of Wales.

Libel by In-
nuendo, by
Pictures, &c.

Holt. A Man may justify in an Action upon the Case
for Words, or for a Libel; *secus* in an Indictment. The
Innuendo will not shake an Action upon the Case for a Li-
bel good, if the Matter precedent is not certain, or im-
porting Scandal, &c. to the Damage of the Party. If a
Man is in Treaty with a Woman to marry, and another
tells him, she is under a Precontract, this doth not im-
port a Scandal; but yet if 'tis false, an Action will lie. In
Case upon a Libel, 'tis sufficient if the Matter is reflect-
ing; as to paint a Man playing at Cudgels with his Wife.
The Court were unanimous, that this was certain enough,
without

without the *Innuendo*. *Powell* allowed the Books to be Law, that where the precedent Matter is not certain, the *Innuendo* will not help.

Queen verſ. Solely & al.

Vide poſt.
Trin. 6 Annæ,
N. 2.
Beaudley Cor-
poration.

(8.) **I**Nformation; for that the Defendants *Riotoſe & Rou-
toſe* aſſembled themſelves together, and hindered
the Mayor, &c. to elect a Bailliff. The Exceptions taken
were, That it did not appear what Office this Bailiff was,
and ſo this does not appear to be a Crime; and the Addi-
tion of the Words *riotoſe, &c.* are only Aggravations. 3 Mod.
83. Sir Robert Atkins's Caſe. To make a Perſon guilty of
a Riot, there muſt appear to be an unlawful Aſſembly of
three and more Perſons, with an Intent to do an un-
lawful Act, which muſt be done; ſo *Hale Pl. Cor. & Coke*.
The Verdict will not help in this Caſe; for the finding of
the Jury to be done *riotoſe*, will not make it ſo; if the
chief Fact does not appear to be ſo, the Verdict will not
help. *Brook Riots.* 3 Cro. 697. 3 Inſt. 176. 2 H. 7. 10.
The Manner of doing a lawful Thing may be unlaw-
ful. *Lambert pa.* 163. Though this is an unlawful Thing,
yet it is no Riot. 3 H. 7. 1. In an Indictment of Riots,
an unlawful Aſſembly muſt be laid *in terrorem Populi Regis*.
3 Cro. 489. 1 Keb. 623. 12 Affixe 32. The Caſe following
Serj. Broderick cited, to ſhew that Coſinage is a good Cauſe
of Challenge, even by the Party that is Coſin; for if
the Court ſees there may be Partiality, tho' the Parties
Conſent, yet the Court ought not to ſuffer it, leſt Juſtice
ſhould not be impartially adminiſter'd. 21 Ed. 4. 21. 1
272. *Moor* 553. 3 Cro. 663.

Holt. 'Tis not the Adverbs *Riotoſe & Rouſe* will make
the Offence, but it ought to appear what the Crime is.
Solicitor General *cont.* 'Tis objected; that the Parties can-
not wave the Benefit of Challenging by Reaſon of Coſi-
nage. *Anſw.* If the Law gives a Man a Benefit, he may
renounce it; an Alien ſhall have the *Medietatem Lingue*,
but yet the Court ſhall not grant it *ex Officio*, but the Par-

ty ought to pray it. *Dyer* 107. He agreed, that if no Fact was charged, the Word *Riotose*, &c. would not make it a Riot; but then it will amount to a Misdemeanor, and they are found guilty. If People, that have nothing to do with the Corporation, will *Clamoribus & Vociferationibus* hinder that Election, this is a Misdemeanor. *Holt*. Never think to help an Indictment by a Verdict, *Eyres*. 'Tis a good Information for a Riot; To the first Objection, That 'tis not set forth to be an unlawful Assembly to an ill Intent. *Answ*. This is not necessary, but the doing the Act is the Thing; and therefore it must be intended to be done to that End, by the Shouting, &c. *Raft. Ent.* 383. 1 *Keb.* 295. For the Act could not be done unless they were so assembled. Another Objection was; It does not appear that the Burgeses were doing a lawful Act, and so the Hindring could be no Offence. *Answ*. It appears they were a Corporation, and if the Bailiff be chosen only to be their Receiver, yet 'tis unlawful to hinder their Choosing him. *Reg.* 106. Trespas may be by Threatning. *Reg.* 94. and a Riot may be *Clamoribus*. *Raft.* 662. And tho' the Bailiff be a private Officer, yet it would be a Trespas to hinder the doing it; and if the Hindring were by many, 'twould be a Riot. 2 *Cro.* 606 or 604. 'Tis not usual to shew the Manner of the Fact; the *Riotose* will not make the Fact a Riot, if the special Matter in the Indictment shews it to be none, which he said would answer Sir *Rob. Atkins's* Case: For there the special Matter shew'd the Nature of the Offence to be other than 'twas laid. *Holt*. Surely it ought to be laid, that the Assembly came together to do an unlawful Act; but if they came there accidentally or lawfully, if two or three do an unlawful Act, or make a Clamour, the rest are not guilty; *secus* if they came together on Purpose. It does not appear that he was a Publick Officer, indeed it is not necessary to shew their Constitution. Is hindring their Election such a Publick Offence as to make it a Riot? If 'twas an Assembly of People together *in terrorem Populi*, as in the Highway, this without more is a Breach of the Peace in general;

* Corporations by Charter are generally supposed to be for the Incouragement of the Trade in that Corporation, and consequently an Advantage to the Publick; and must be so intended by their having a Charter, which is not to be supposed to tend to a private Advantage; if so, then to commit an Offence against a Corporation, which is acting for the Benefit of Trade, and by a Charter, is a greater Offence than the same Act in the Highway, which has only the Protection of the Crown for the Benefit of Trade, without a Charter.

ral; But hindring their Election is in the Nature of it only * particular. *Holt*, in answer to *Broderick*, objected, That no Man has Reason to complain of his Kinsman's being on the Jury; why the Reason that Knights were to be on the Jury, when a Peer was concerned, was for the Security of the Commons; for a Knight was presumed to be a Man of Courage, and not afraid to look a Peer in the Face. *Powell*. 'Tis true, Knights are for the Privilege of Peers, but yet for the Security of the Commons. We must distinguish between Crimes; he agreed to the Definition of a Riot *in supra*. An Affray, Riot, and unlawful Assembly, are different Offences, and consequently different Punishments. *Holt*. If I am writing a Letter, and three or more come hallowing and jogging me, is this a Riot? no; it ought to be *in terrorum Populi*. *Adjourn*.

Smith and Tindal.

Lands and Hereditaments devised to an Executrix, in Trust, &c. carry a Fee.

(9.) *MAX* Taylor seized in Fee devises to the Poor of *Sutton* 40 s. to be distributed by his Executors, with four Coats, four Hats, upon every 21st of Nov. for ever; makes his Wife *Margaret* Executrix; devises all his Lands, Tenements and Hereditaments, and all his personal Estate, to *Margaret* the Executrix, who marries with one — and the Husband and Wife by Indenture, &c. covenant to levy a Fine *sur Cognissance de droit come ceo* to the Use of — and *Margaret*, with a Warranty, who conveys to the Plaintiff. *Could*. The first Point is, what Estate is conveyed by this Will? whether an Estate of Inheritance. *2dly*. If the Warranty binds. As to the first he held it a Fee, because of the Words of *perpetual Charge*. Co. Lit. 8. The personal Estate is not, in the Eye of the Law, a sufficient Estate to answer a perpetual Charge. *Trim*. 28 Car. 2. Rot. 987. 2 *Jon*. 1113 or 1119. He would not speak as to the Force of the

the Word *Hereditament*, but went upon the perpetual Charge; and so would not speak to the Warranty. *Purvis*. This being in a Will, 2. if the Word *Hereditament* will carry a Fee; and then if the perpetual Charge will not make it a Fee, according to *Collier's Case*. And 3dly. If this collateral Warranty will not bar the Rebutter. *Lastly*. If this Warranty can be given in Evidence. As to the first he thought it might. There is a Difference between the Word *Inheritance* and *Hereditament*; the first denotes the Interest, the later describes somewhat that is not a Tenement; but in this Case we are on a Will, and so not to go to the learned and strict Signification, but for the common Parlane and Intention. *Cro. Car.* 447. 1 *Jones* 308. *Cro. Car.* 450. 1 *Saund.* 380. *Moor* 873. *Hob.* 2. To the second Point of the Charge, the Will says, *to be delivered by my Executrix and her Assigns*; which must be construed as if to his Wife and her Assigns; for it seems to regard her not only as Executrix, but as his Wife personally, who was the Devisee: Then the Warranty secures the Plaintiff's Title. *Vaugh.* 392. *Hob.* 27. *Brook tit. War.* 31. 19 *H.* 6. 59. *Powell*. Judgment ought to be for the Plaintiffs, chiefly on the Warranty. A Devise of all my Lands, Tenements and Hereditaments, he could not allow would carry a Fee, as *Powis* held. The Word *Hereditament* doth not signify the Estate, as Inheritance doth. Devise of 100 *l.* per Annum, paying 40 *s.* a Year for ever, must be a Fee of the perpetual Rent. *Cro. Jac.* 1 *Roll Abr.* 835. 10 *Co.* *Seymor's Case*. A collateral Warranty may be taken Notice of, as well by Evidence as by Rebutting. He agreed, a Warranty does not give a Right. *Fitz. Droit* 29. *Lit. Sect.* 708. Collateral Warranty attach'd does not extinguish the Tail. Collateral Warranty neither gives nor extinguishes, but binds the Right, and so the Entry is wrongful, because the Right is bound. If Tenant for Life levy a Fine, the Fine gives a Fee, but then Tenant for Life commits a Forfeiture. *Holt.* Judgment *pro Quar.* The Words of the Will give a Fee. Here being a general Charge for ever, and a sufficient personal Estate to purchase, &c. But he was not satisfied to fix it upon the Land. He went upon the Word *Hereditament* to

Hereditaments

Collateral Warranty.

shall not be bound by it

Hereditament
imports a Fee.

to make a Fee; the Words *Lands and Tenements* carry only an Estate for Life, but Hereditament carries the Fee; for if he had not a Fee, then it was not his Hereditament; and when he gives his Hereditament, he gives a descenable Estate, otherwise 'tis no Hereditament. *Co. Lit. 6.* These Words cannot be satisfied, unless this Word carry the Inheritance. *Hob. 2.* is rightly reported, and wrong in *Moor 873.* Lands of Inheritance is only a Description of what Lands shall pass. Touching the Warranty: If a Disfeisor continues Possession twenty Years, and the Disfeisee enters, or brings an Ejectment, the Disfeisor shall maintain his Possession, by the Statute of Limitations; for he has acquired a *Jus Possessionis*, tho' not a Right to the Inheritance.

Hill. Term. 1706.

5 Annæ Reginae in B. R.

Annesly and Dixon.

Error from
Ireland.
Vide ant.

(1.) **E**RROR of a Judgment in *Ireland*: The Question was, Whether the late *Irish* Trustees, authoriz'd by Act of Parliament to inquire of the forfeited Estates, had the sole Power in them of judging what were forfeited Estates, and what not? Or, whether that might be found by a Jury? All the Judges but *Powis* held, that Point ought to be decided by a Jury.

Holt's Opinion. It appears that all the private Estate K. *James* had at the Day he came to the Crown, and all the forfeited

forfeited Estates, are vested in the Trustees; and these Estates were designed to be sold for the Purposes in the Act; and the Person or Persons seized of such Lands are by this divested, tho' upon never so valuable a Consideration. If a forfeiting Person had only a Right of Action or Entry, yet this is vested in the Trustees; the like of a Condition. If the forfeiting Person had an Estate for Life or Remainder, such Estate and such only is vested. If a Person is disseis'd by K. James, the Disseisee is bound to make Claim; which shews this is a special and particular Jurisdiction of such and such Lands. All Jurisdictions are limited to Place, Persons and Things. Their Jurisdiction here, arises from the Lands vested. The Statute vests such Lands as really were K. James's; but not such as they should say were vested; and the Statute gives them no other Jurisdiction. But to say, the Trustees had a Power to say, an innocent Person's Estate should be liable, &c. would be a *bellish* Construction, and such as the Parliament of *England* could never intend. If they cannot know what were the King's Lands, they cannot inquire, and therefore they ought to inform themselves a-right; for a Man can purchase no better or other Estate than the attainted Person had. *Powis* said, the Jury have nothing to do with it; this is begging the Question. For a Jury are to inquire whether the Lands are vested? and if they were not vested, the Trustees had no Jurisdiction, and 'twas *coram non Judice*. 10 Co. *Marshall's Case*. Suppose a Man brings a Formedon here, and the Tenant admits and pleads, and then another is brought in the Common Pleas, the Tenant cannot plead this here in Bar; for 'tis void here, and *coram non Judice*. So the Judgment in *Ireland* was affirmed, contrary to *Powis*.

St. George's Southwark vers. St. Margaret's Westminster.

Poors Settlements.
Children Bastards if born after Divorce.

(2.) **ORDER** of Sessions. Three Children born in St. George's Parish, on the Body of Margaret Bilby, Wife of George Bilby an Inhabitant of St. Margaret's Westminster. The Inhabitants of St. Margaret's alledged, that the Mother was a lewd Woman, and was divorced from her Husband, and had the Children a long Time after the Divorce; but the Justices sent them to St. Margaret's Westminster, feeling the Husband lived there; supposing that to be the Place of their last legal Settlement. Serjeant Broderick moved to quash the Order; for that the Children were Bastards. *Holt & alii Just.* They are Bastards, being begotten by an Adulterer after a Divorce. 'Twas objected, It did not appear by the Order but that the Husband got them. *Holt.* We will intend the contrary, unless you can prove their Cohabitation. But being of great Consequence, *adjourn.*

Vide post.
Trin. 6 Annæ,
N. 9.

Lands devised
whereof the
Devisor is
not seised.

Bronker vers. Coke.

(3.) **I**F Lands shall pass by a Devise, that the Devisor was not then seised of, is the Question. Raymond cited 3 Co. 30, 31. Dyer 158. 10 Co. 83. And urged, That no Law supports my Lord Coke's Opinion; and the Opinion of Dyer was only *obiter*. The Resolutions on the Statute as to the Word (*Having*). Co. Lit. 111. b. Coke in his Comment does not take Notice of the Opinion of Lit. as to the Custom, That any Man seised of Lands may devise. He might as well devise Lands to be had as Chattels, from the Nature of the Writ *Ex gravi Querela*. Fitz. N. B. 193. Plowd. 343. Mich. 39 H. 6. 18. Fitz. Devise, 17. Bro. Dev. 15. Lit. Sect. 167. Besides, he was seised of them before the Devise took Effect. Serjeant Parker *cont.* These Lands were purchased nine Years after the Date of the Will. Here are two Points.

1st, A Want of Power in the Devisor at the Time, &c. as not being seised. 2^{dly}, As to his Intent; which may well be doubted, if it were to pass these Lands. Heirs are to be favoured; and this would be to carry a Will further than a Deed, or a Man's Grant. He cited *Co. Lit.* 327. b. that the Exposition of this Statute ought to be according to the Reason of the Common Law; and 2 *And.* 12 *Dyer* 154. If Persons, Ideots, Infants, &c. had not been named, yet being disabled by the Common Law, they could not have devised. The Common Law will not allow it good when he has it not. For a Man cannot judge right as to future Things: 1 *Inst.* 47. *Dyer* 49. a. *Hob.* 45 & 156. *ENN. Sett.* 446. *Hob.* 132. 3 *Cr.* 401. A Covenant to stand seised to Uses of Lands which a Man has not, is void. 2 *Roll* 190. *Adjorn*.

Anonymus.

(4.) **P**ER Cur'. A Writ of Error allowed by the Chief Justice, or Clerk of the Errors, is a *Supersedeas*; tho' the Attorney of the other Side has no Notice, and the Notice is only to bring him into Contempt. 6 *H.* 4. 14 or 15. *Godbols* 439.

Brown vers. Dyer.

(5.) **D**YER, Seised of Copyhold Lands in Fee, in Nature of Burrough *Englsh*, surrendered to the Use of himself for Life; Remainder to his Wife for Life; Remainder to the Heirs of their Bodies. *Per Cur'*. When a Copyholder surrenders to the Use of himself for Life; Remainder to the Wife for Life; Remainder to the Heirs of their Bodies; altho' there is no Admittance pursuant to this Surrender, the Son shall have a Fee-simple; for his Father's Estate continues in the same Plight, &c. The Court seemed clear, that the customary Descent should be governed by the Reason and Rules of the Common Law.

Tuckerman

Vide ante
Mich. 5 Annae,
N. 6.
Customary
Disceins guid-
ed by the
Rules of Com-
mon Law.

Vide infra,
and *Trin. 6*
Annæ, N. 3.

Jointenants or
Tenants in
Common.

Tuckerman and Jefferies.

(6.) **T**RESPASS; Not guilty; Special Verdict; Somaster, seised in Fee of the *Locus in Quo*, made a Will thus: *I am*, I give unto the Wife of *Tho. Jefferies*, and *Eliz.* the Wife of another, all my Estate, to be equally divided between them for their Lives; and after their Deaths, to the right Heirs of one of them. The Quest. if this be a joint Estate, or if they are Tenants in Common? *V. Stile 211.* Adjourn'd till next Term to be argued. *Vide infra.*

Easter Term, 1707.

6 Annæ Regina in B.R.

Tuckerman vers. Jefferies.

Vide supra;
Post. Trin. 6
Annæ, N. 3.

Where a De-
vise to two e-
qually, &c.
is a Jointe-
nancy.

(1.) **D**EVISe of all my Estate to my two Nieces, to be equally divided between them, during their Lives; and from and after their Decease, to the right Heirs of one of them.

Mr. Eyres. That this is a joint Estate. To be equally divided, is a Quality of a Jointenancy, as well as to a Tenancy in Common; and the Words *to be equally divided* is what the Law implies. *Stile 211. 2 Roll Abr. 90. 2 Leo. 70.* If this should be construed, that they should take by Moities, it may happen that the right Heirs of the one may never take the whole; because the Remainder, *quoad* the Moiety, is Contingent. *4. Leo. 14.*

Pengelly.

Pengelly. Here are not subsequent Words of sufficient Force to over-turn and weaken the Force of the former Words; and upon this the Distinctions run. 3 *Lev.* 373, 374. *Style* 434, 435. *Raym.* 452. *Dalison* 77. If it be joint, then the Heir may lose his Moiety during the Life of the other, which will be equal to the Contingency.

Holt. The Cases Mr. *Pengelly* cited, as to the Words *equally divided*, run on this Reason, That if they did not make a Tenancy in Common, they would signify nothing. He agreed to the Case put by *Eyres*, of the Contingency. The Opinion of the Court seemed to be, That it was a Jointenancy; by Reason of the Danger of the contingent Remainder, which otherwise might be lost. *Adjournatur.*

Note; In *Trinity* Term following, *Holt* C. J. deliver'd the Opinion of the Court, that this was a Jointenancy, by Reason of the contingent Remainder.

Queen vers. Lord George Howard.

(2.) **L**ADY *Howard* exhibited Articles of the Peace against her Husband the Defendant; whereupon he was bound to keep the Peace for a Year. Sir *Edward Northey* moved to discharge the Recognizance, upon a Suggestion, that my Lady was consenting; and his being bound was upon her Prayer.

Security of the Peace extends to all Men.

Holt. How can we discharge it before the Condition is performed? Besides, if my Lord breaks the Peace upon any one else, 'tis a Forfeiture of his Recognizance; and so denied the Motion.

Mr. H——t's Case.

(3.) **N**OTE; In this Case *Holt* Ch. J. declared, That whenever a Copy of a Deed shall be allowed as Evidence, there the Inrolment of a Deed for safe Custody shall be so allowed; and a Copy of a Deed is good Evidence, where the Deed is lost, burnt, &c. or is almost worn out,

Enrolment of Deeds where Evidence.

or obliterated; because in those Cases there is plain Evidence of the Deed it self. But the Evidence of a Copy of a Deed *imrolled* is only *conclusive* to those that acknowledge it; therefore 'tis necessary all Parties to it acknowledge it, and then it amounts in Effect to a *new Deed*; but 'tis also necessary, where a Man's Evidence consists in such Copies, that he has a Covenant from the Party that has the Originals, to produce them whenever he may have Occasion for them.

Queen vers. Standish.

Sessions cannot order an Administrator to refund.

(4.) **M**R. *Eyres* moved to quash an Order of Sessions; which was to Force an Administrator to refund the Money the Intestate received with his Apprentice; which was to the Trade of a Barber-Surgeon. He took two Exceptions; The one, that a Barber-Surgeon is no Trade named in the Statute; nor was it a Trade at the Time the Statute was made. He cited a Case adjudged so, of an Indictment against one for using the Trade of a Merchant-Taylor; which Indictment was quashed. The other, that it would be of dangerous Consequence to charge an Administrator. And of this Opinion the whole Court seemed to be strongly; For how can the Justices examine the Matter of Assets? and their Order is not like a Judgment, which an Executor may plead, and which is always *de bonis Testatoris*; but in this Case they must attach the Party himself. Serjeant *Cheshire* argued, that there is a general Clause that extends to all Trades; and that a Decree of a Court of Equity, and an Order of Sessions, are in Nature of Judgments; and would be allowed of in a Plea by the Administrator; which the Court in great Measure denied; for no Writ of Error lies in either Case. To this *Cheshire* urged, That a *Certiorari* is a Writ of Error, &c. *Re adjorn*.

Certiorari.

To Intestates order and refund.

Anonymous.

Anonymous.

(5.) **B**Y *Holt* Ch. J. If a Lord of a Manor refuses a Tenant a Sight or Copy of a Court-Roll, to make such Use of them as the Tenant may think proper, either to ground a Fine upon, or make his Defence: He said, *Hale* was of Opinion, an Attachment should go against the Lord. The like Law as to a Corporation; *quod* the Inspection of Books. *Vide post. Trin. 6 Anna, N. 14.*

Copy of Court-Rolls refused by the Lord.

Lord Herbert vers. Shaw.

(7.) **S**Erjeant *Broderick* moved for a new Trial, upon a Letter under the Duke of *Leeds* his Hand, to influence a Juryman, to this Purpose, That he should think himself obliged to him, and would quit the Obligation whenever 'twas in his Power, &c. he cited *Moor* 816. *Nov* 102. 2 *Inst.* 484. *Sir Edward Northey* son. Writing Letters to Gentlemen, to desire them to be ready, and to solicit them to attend, is grown into a constant Practice; and must be allowed of, so far as it tends only to solicit to get a full Jury. He produced an Affidavit, that the Attorney on the other Side had Notice of that Letter before the Trial. *Raymond.* 'Tis only a Letter to the Gentlemen to come and do their Duty, and to attend; and tends to no Discovery of the Matter of Fact, nor to prepossess the Jury; and the Conclusion is only an usual Compliment, Which I shall take as a great Obligation, and shall be glad of an Occasion to shew how much I am your Humble Servant. *Holt* order'd the Attorney to be sworn, if he knew any Thing of this Letter before the Affises; he was sworn, and said, he did not know of it, any otherwise than as a flying Report. The Court thought this Letter something more than the usual Compliment. The Duke of *Leeds* was a Stranger to the Issue, but he was a Remainder-Man, and so might maintain, as a Father might maintain lawfully

Motion for a new Trial. See *Easter Term* 5 *Anna, N. 4.*

fully for a Son. *Holt*. But a Father ought not to make use of his Authority or Nobility for his Son. Lord *Herbert's* Lady was the Duke of *Leeds* his Daughter. But the Opinion of the Court seemed to be, not to grant a new Trial. *Sed adjournatur. Post. Trin. 6 Annæ, N. 3.*

Trevillian against Pine in C.B.

In Replevin,
the being Bail-
liff, traver-
sable.

(8.) **L**ORD Ch. Just. *Trevor*. Judgment of the Court, that the being Bailiff in Replevin, or in Avowry, is traversable; 3 *Lev.* 20. 1 *Leo.* 50. 2 *Leo.* 206, 207. for otherwise a Man might be twice charged; for suppose in the Avowry Damages are given; then suppose the Lord brought Trespass, and the Tenant pleaded the Recovery in the Replevin, this shall not conclude the Lord; for 'twould be very mischievous, that the Lord should be concluded, and not be able to say that he was not his Bailiff, and had no Authority either express or implied. 3 *Cro.* 14. That Difference in *Cro.* he agreed was an Authority against him, but the Books above cited are all to the contrary, and so 1 *Roll Rep.* 46. Also a Difference betwixt Trespass, *Yelv.* 148. for *Clausum fregit*, and for taking Cattle, in the one Case, not his Freehold, is a good Plea. *Sed non è converso*, for I may have Property in the Cattle, *Brit. tit. Trav.* 3. Bailiff or not Bailiff may be given in Evidence, *a fortiori* pleaded. An Agreement or Consent subsequent will amount to an Authority, &c. And the whole Court agreed that 'tis traversable.

Hoskins and Lee.

Prohibition in
Scandal.

(9.) **A** Motion was made for a Prohibition to the Spiritual Court, upon a Libel there for these Words, *He is a great Rogue, as great a Rogue as ever was hang'd; and deserves to be hang'd more than Dr. Pims.* A Prohibition was granted, because no Spiritual Defamation.

Holt

Holt said, If A. call'd B. a Son of a Whore, he cannot Libel in the Spiritual Court; but his Mother may, because in this Case 'tis no Spiritual Defamation to the Son; but 'tis to the Mother. Vide post.
May and
Hers.
3 Lev. 119.

Queen and Hickeringill.

(10.) **H**ickeringill was indicted and found guilty of a Misdemeanor, in altering an Assessment, which he with the other Commissioners signed in Pursuance of the Land-Tax Act, which was enacted at a Sessions of Parliament, held in November, quarto Anna Regina. Exception was taken, that in the Indictment the Act was not well set forth; for tho' the Writs of Parliament were returnable the 14th of June, the Time mentioned in the Indictment, and right according to the printed Book, yet being prorogued till October, the Sessions did not commence till then; whereupon the Indictment was quashed. Vide ante.
AG of Parlia-
ment not well
set forth, the
Indictment
quashed.
Sessions of
Parliament.

Queen and Harris.

(11.) **H**arris was indicted for riotously entering the Close of J. S. and cutting down and carrying off twenty Ashes and thirty Oaks, *ibidem crescentes, de Bonis & Catallis* of J. S. and his Wife. Indictment
good for Part
and void for
the Rest.

Pengelly for the Defendant said, they could not call them *Bona & Catalla* of the Husband and Wife, and being faulty in that Respect, the whole is void, and must be quash'd; being different from the Case in *Latch* 173. where the Offences were distinct and several. *Parker contra*. They are several Trespases, and tho' void for one, yet may be good for the rest. 1 Lev. 3. in
Trespas.

Per Cur'. Judgment for the Queen, as to entering the Close, and the Indictment void as to the rest. For Trees growing cannot be called *Bona & Catalla*.

Queen and Pawlett.

^aIndictment
for not execu-
ting a War-
rant.

(13.) **A**N Indictment against *Pawlett*, for not executing a Warrant of a Justice of Peace upon a common Baker, for exercising his Trade on a *Sunday*, contrary to the Act. Exception to the Indictment, that it does not appear the Conviction was within ten Days after the Fact, which is the Time limited by the Act; the Indictment said only *debito modo convictus*.

Holt was of Opinion, that since 'twas said that he was convicted, it shall be taken for a good Conviction in all Respects; and the Defendant should have taken Advantage of the contrary, by shewing it in Evidence upon the Trial. 'Twas agreed by the Court, that for Things unnecessary, as Puddings and Pies, for Baking them an Indictment will not lie on the Statute; but for baking Bread it will.

Sed quare Differentia rationem?

Trin. Term, 1707.

6 Annæ Reginae in B. R.

The Queen against Lady Ogletborpe.

Indictment on
the Statute of
Recusancy.

(1.) **I**Ndictment for High Treason upon the Statute of *Jac. 1.* For converting her Servant-Maid to the Roman Catholick Religion. Not guilty was pleaded; and upon the first Day of the Term, the Attorney General came into Court and confessed the Plea to be true, by

a special Mandate from the Queen; whereupon she was discharged. *Vide ant. Pasche 4 Annæ, N. 32. Goddard and Smith.*

Queen against Soley, &c.

(2.) **T**HE Defendants were convicted upon two Informations for Riots: The first was for hindring the Bailiffs and Burgesses of *Budely* in their Choice of a Bailiff for that Corporation; and the Information sets forth, that the Bailiffs and Burgesses being assembled to choose a Bailiff for the Burrough of *Budely*, the Defendants, *Riotose & Routose Clamoribus & Vociferationibus, &c.* hinder'd them upon the said Election.

Two Informations for Tumults qualified. *Vide ant. Mich. 5 Annæ, N. 8.*

The second Information was for breaking open the Door of the Guildhall of the Burrough of *Budely*; which sets forth, that the Defendants 23^d of *October* did assemble themselves to disturb the Peace, & *sic Assemblat* did break open the Door of a certain House, *vocat* the Guildhall of the Burrough of *Budely præd*.

The two Informations were moved in Arrest of Judgment; and after several solemn Arguments, *Holt* Ch. J. delivered the Opinion of the Court this Term, that both the Informations were naught, and Judgment ought to be arrested.

The first not good, because it did not appear what Authority they had to choose a Bailiff. But if People have a lawful Authority to choose a Member of a Corporation, and above two come with Clamour and Noise to disturb them, it will be a Riot, and 'tis a Trespass; so 'tis of any Franchise, Dean and Chapter, &c. 29 Ed. 3. 74. Register 103. But in this Case it does not appear they had Authority, (which should have been shewn,) either by Charrer or Prescription; 'tis their having a Right to elect that makes this an unlawful Act. If they had no Right, it would be no Riot; but their having a Right, and the Defendants acting in Opposition to this, in a tumultuous Manner, makes it a Riot; but here the Plaintiffs Right does not

not appear. Therefore Judgment must be arrested on the first Information.

Then as to the second Information, 'tis ill; because it does not shew whose House it was. 'Tis said they broke open the Door *cujusdam Domus*; 'tis very well known that in a Declaration, it would not be good to say that he broke open the Door *cujusdam Domus*, but it must be *ejus Domus*, to make it appear to be the House of him that brings the Action; indeed in an Indictment for stealing a Horse, it has been held well to say *equum cujusdam ignoti*, because it appears that 'tis not his own; and there the Indictment well lies. But to make a Riot, there must be an Assembly, and an unlawful Act done. It has been objected, that 'tis said to be in the Guildhall of the Burrough, and that would be tantamount, and like the Case of a Riot in a Church. To which I answer, 1st, It does not appear to be the Guild-hall of the Burrough, it only saying *vocat'* Guild-hall is not enough, for it does not describe the Thing; and besides, it should have been in *Latin*, according to 36 *Ed. 3.* otherwise it stands for nothing. 10 *Rep. Osborn's Case*. And then taking it that *Guild-hall* is left out, 'tis no more than if it had been said they broke the Door *cujusdam Domus*.

2^{dly}, If it had been sufficiently described to have been the Guild-hall of the Burrough of *Budely*; yet it might not be the Guild-hall of those People thus assembled; for Burroughs may belong to Lords of Manors, many Burroughs are Manors, and a Guild-hall may belong to the Lord of a Manor.

The Books are obscure in the Definition of Riots; I take it, 'tis not necessary to say they assembled for that Purpose, but there must be an unlawful Assembly; and as to what Act will make a Riot, or Trespass, such an Act as will make a Trespass will make a Riot. If a Number of Men assemble with Arms, *in terrorem Populi*, tho' no Act is done, 'tis a Riot. *Hob. 91.* If three come out of an Ale-house and go arm'd, 'tis a Riot. 3 *H. 7. 1.* Tho' a Man may ride with Arms, yet he cannot take two with him to defend himself, even tho' his Life is threatned; for

Queri.

he is in the Protection of the Law, which is sufficient for his Defence.

It has been objected, that in this Information 'tis not said *in terrorem Populi*. To which I answer, that in this Information 'tis well without it; for in those Riots, which are Riots without any Act done, as going arm'd, &c. it must be said *in terrorem Populi*; but when an Act is done, 'tis otherwise. Sir Robert Atkins's Case is no Riot, because he went to claim a Right. If several, thinking they have a Right to elect, meet to assert their Right, if they do not do it in a violent Manner, 'tis no Riot.

If a convenient Number go to claim Common, which is inclosed, and they pull down the Inclosure, 'tis no Riot; because they go under a Claim of Right.

'Tis not necessary to say (in an Information) that they assembled with an Intent to commit a Riot; for to say they assembled *riotose & routose*, and committed an unlawful Act, is sufficient, for that is a Riot.

My Lord Ch. J. Holt delivered this as the Opinion of the Court; and thereupon Judgment was arrested upon both Informations.

May vers. Horse.

(3.) A. Called B. Bastard; B. and his Mother Libel in the Spiritual Court for Defamation, viz. for Calling him a Bastard, and his Mother a Whore, by Implication. Raymond for the Defendant argued, That upon a Libel in the Spiritual Court for these Words, *Thou art a Son of a Whore, and thy Mother is a Bitch*; a Prohibition was granted, because the latter Words made the former Nonsense; so here, for the Woman appears to have a Husband. But he admitted, that for calling Whore, without other Words, a Prohibition was denied; for that is merely of Spiritual Conusance.

But per Curiam, That according to the Case in 3 Levinz 119 the Mother may in this Case well Libel for the Scandal by Implication. And a Prohibition was denied.

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Scandal.
Whore by
Implication.
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denied.

a Roll Abr.
295.

See Hoskins
v. Lee, ante.

Vide ante in
Easter Term,
N. 7.

Motion for
new Trial
denied.

Lady Herbert vers. Shaw.

(4.) UPON an Issue joined, in an Action between my Lady Catharine Herbert, Daughter of the Duke of Leeds, and the Fishermen of Milson, a Letter was written by the Duke of Leeds to every particular Jurymen, wherein he desires their Appearance at the Trial, and concludes his Letter in these Words, viz. *Which I shall take as a great Obligation, particularly from your self, and shall be glad of an Occasion to show how much I am, Sir, your Humble Servant.* Upon which the Defendant moved for a new Trial; and 'twas argued by Mr. Comers, That none but the Parties themselves can solicit a Jurymen to attend, &c. and cited *Moor 813. 1 Inst. 369. 2 Inst. 484.* Norley for the Plaintiff said, That the Duke being Father to the Plaintiff, it could not be Maintenance, &c. And Raymond also for the Plaintiff said, That it was the Defendant's Neglect, in not discovering the Letter before the Trial, and making his Challenge thereupon, since it appears that they knew of it before, and probably kept it by them as an After-refuge, in case the Trial went against them, as it did; however, the most they can make of it is but Maintenance, which is not a sufficient Cause to grant a new Trial, tho' Embrocary is. *Called B. Bafford.*

Powell Justice said, He remembered a Case in C.B. where a Stranger wrote a Jurymen to consider that the Plaintiff was a poor Man; for which a new Trial was granted, and the Writer taken up and committed: But here, this seems only an invitation, and an Endeavour for a full Jury to appear, in order to avoid a Tales; and a Man may write in Behalf of his Daughter. But the Doubt with me is on the Compliment here paid to the Jurymen, by so great a Man as the Duke of Leeds. And thought the Fact hardly justifiable even in a Father.

This Case was argued in Easter Term last, and likewise in this Term; and now 'twas resolved by Holt Ch. J. Powell, Potts and Gould, That no new Trial should be granted.

granted; because the Defendant having Notice of such a Letter long before the Trial, might have moved for a Trial at Bar, which the other Side had offered to consent to: But taking the Letter, as it is in it self, 'tis of dangerous Consequence; for 'tis a Temptation to the Jury to be partial, and takes off their Indifferency. But *2dly*, if a Party have Cause of Challenge, and knows of it Time enough before the Trial, if he does not challenge, *Note*, he shall not have a new Trial; *contra* if he has not timely Notice of it. The Party himself cannot give a Juryman Money to appear; for it cannot be supposed that he will hire him to give a Verdict against himself. But the Motion was denied. And *Note*; *Holt Ch. J.* in delivering his Opinion cited a Case in *Edw. 3d's* Time, where a new Trial was granted, because a great Lord concerned in the Cause sat upon the Bench at the Trial.

Hardwick against Gamball.

(5.) A Special Verdict finds, a Settlement in Consideration of natural Love and Affection to himself for Life, then on Trustees to preserve contingent Remainders; Remainder in Tail Male. Provided if Tenant for Life die without Issue Male of his Wife, and having Daughters, the Trustees to stand seised for thirty-one Years, with Intent to raise such and such Legacies to the Daughters. Provided also, that if the next Issue Male in Remainder, within five Years, pay the Legacies, that then the Trustees should stand seised to such Issue Male as should pay the Legacies, with Remainders over; Tenant for Life dies without Issue Male or Female. 'Twas objected, that if the Term never accrued, the Remainders are void. 3 Cro. 465. *Dyer 34. b.* *Holt Ch. J.* That the contingent Term never arose, yet the Remainders are good, if the precedent Estate to the Term for Years be sufficient to support the Remainders.

Limitation on a Condition precedent of a contingent Remainder, good.

Eyres argued, That this Remainder can never arise, it being a Condition precedent, and 'tis not found that the Legacies are paid; and that the Remainders are void in their Creation. If the first Remainder be contingent, all the others subsequent must be contingent. There must be an intermediate Time betwixt the Payment of the Legacies, being precedent to the vesting of the Remainder, and so void, it not vesting *eo instanti*. 'Twas said, that the first Remainder was nonsensical, *viz.* That if he died without Issue Male, that then his next Issue Male in Remainder, &c. whether the Term arises or not, the Law to us is the same. If the Condition be impossible, no Estate can grow thereupon, and neither the Act of God, nor the Party, can dispence with this Condition, if it be precedent.

Issue Male taken for Heirs Male.

Holt C. J. The Payment of the Money was to let the Issue Male into Possession, notwithstanding the Term. And no Payment was intended, unless there was a Dying without Issue Male, leaving Daughters. The Clause, *and for Default of Issue Male, Remainder to the Issue Male*, should have been, Heirs Male in Remainder, and then there had been no Doubt. And it was adjudged, that the Remainder was good; and well vested.

Prime against Mason.

Writ return. Dies non, void.

(6.) *SCIRE Facias.* Demurrer to the first Writ, because it was returnable *Die Luna in tres Septimanas Sanctæ Trin'.*

Per Cur'. It is a void Writ; for there is no such Day, it being on a Sunday, and so was not a Miscontinuance to be help'd by the Statute of *Jeofails*; and it being a void Writ, the Court *ex Officio* ought to take Notice of it, being pleaded in Bar, and ought to quash it, and so there is no Writ in Being.

Anonymus.

(7.) **T**ENANT for Life, Remainder in Tail, Remainder in Fee; Tenant in Tail levies a Fine; this has for ever hinder'd Tenant for Life, and Remainder in Tail, from destroying the Remainder in Fee; because the Fine has turned his Estate into a base Fee, and has destroyed all Privy of Estate; so that if Tenant for Life, and Remainder in Tail, would make a Tenant to the *Præcipe*, yet they cannot vouch the Remainder-Man in Fee, without he will voluntarily enter into it.

Where a Remainder in Fee not barable by Tenant in Tail.

The Queen against Harris.

(8.) **I**NDICTMENT for entring his Close, and cutting down several Trees *adunc & ibidem crescentes, de Bonis & Catallis* of the Husband and Wife. Exception, that Trees growing could not be Goods and Chattles. *Holt.* Read the Indictment, and see if it say *Crescentes*, and it did not say so. But,

Trees growing, no Chattels. *Vide ante.*

Per Cur'. *De Bonis & Catallis* shall be void, as if not inserted, and the Indictment is good without them; so Judgment was for the Queen.

Brunker vers. Cook.

(9.) **E**JECTMENT was brought for Lands in Kent, on the Demise of Francis Bokenham; and on Not guilty pleaded there is a special Verdict; wherein the Jury find, That William Bokenham, Esq; being Commander of her Majesty's Ship the *Grafton*, on the 3d of May 1692. made his last Will and Testament in Writing, which they find in *hec Verba*; He writes, that he was then bound out to Sea, &c. and says, *I do hereby give, devise and bequeath to my well-beloved Wife, Frances Bokenham, all such Sum and Sums of Money as now is, or hereafter shall become due to me from*

Devise of all my Lands, &c. not to extend to Lands purchased after. *Vide post. Archer v. Bokenham.*

their Majesties for my own and Servants Service, either by Sea or Land: As also such Sum and Sums of Money, Lands, Tenements, Goods, Chattels and Estate whatsoever, wherewith at the Time of my Decease I shall be possessed or invested, or which shall then, or of right doth appertain unto me: And I do hereby nominate and appoint her the said Frances Bokenham, my well-beloved Wife, to be the whole and sole Executrix of this my last Will and Testament.

They find, That William the Testator, at the Time of making this Will, was not seised of any Lands in the County; but afterwards, by Deeds of Lease and Release, dated the 20th and 21st Days of March, in the Year of our Lord 1700. Sir George Wheeler and others, being seised in Fee of the Lands in the Declaration particularly mentioned, conveyed the same to the said William Bokenham the Testator, and his Heirs, by Virtue whereof he became seised.

They find, that the Lands are held in Socage, and are of the Nature of Gavelkind, and devisable by the Custom of Kent; and that sometime afterward William Bokenham dies, the Devisee enters, and the Heir at Law enters upon her. Now the Question between them is, Whether these Lands do pass by the Will of Captain William Bokenham, or not.

Ch. J. Holt
delivering the
Opinion of the
whole Court.

We have considered of this Case all together, and we are all of Opinion, that the Will, as to these Lands, is a void Will, and that the Lands do not pass thereby, but that Judgment ought to be for the Defendant, the Heir at Law.

We agree, That the Words of the Will are full and comprehensive enough to pass all these Lands, had he been seised of them at the Time of making this Will; and we hold, they cannot by Law pass on this Account, only because the Testator was not seised of these Lands in the Year 1692. at the Time of making the Will; tho' perhaps it might be his Intention and Design to have them pass.

The Case is no more than this: A Man makes his Will, and devises all his Lands that he shall have at the Time of his Death; and after that he purchases Lands, and dies

dies without Republication, we hold that is a void Devise; for a Man cannot devise any Lands but what he hath at the Time of making the Will. *

And if it be of Lands devisable by Custom, 'tis the same Thing as of Lands devisable by the Statute. A Will, be it by Custom or Statute, is still a Disposition of the Estate and Lands he then has; but no Man can bequeath Lands or Estate he has not at that Time; and tho' a Will does not take Effect to transfer the Estate till the Death of the Testator, yet it is a Will and Disposition of his Estate, even at the Time of making such Will; for from that Time it is a Will, and a Disposition of what he devises away.

There is no Act between the Making of a Will and the Death of the Testator, necessary to be done to make this a perfect and compleat Will; no Writing, no Publishing, nor any other Act whatsoever; it is subject indeed to a Revocation, during the Testator's Life, and is to take Effect only from the Time of his Death; but it is a Will, and a Disposition of the Estate bequeathed from the Time of the making thereof.

Wheresoever there is a Disability in the Testator, at the Time of making the Will, tho' that Disability be actually removed before his Death, yet the Will will still be a void Will, because he had no Ability at that Time.

Suppose an Infant makes a Will, and devises Land during his Infancy; or a Feme Covert, in the Life of her Husband, makes a Will and disposes of Land thereby; tho' the Coverture and Infancy be afterwards removed, and the Husband die, or the Infant come of Age; yet if either of the Devisors die, without new Making or Publication of the Will, this is a void Will, because of the original Disability; tho' they should live many Years after such Disabilities removed, yet the removing those Disabilities will not do, without a new Publication, or making a new Will.

Now those are personal Disabilities, but this a real one, he had nothing in this Case to give or dispose of; so here is a Removal of a real Disability; and shall the Removal of that be more effectual to make it a good Will, than removing a personal Disability? no surely.

It

* Vide Pleud.
342, 343, &c.
Brett v. Rigg-
den.



It is said in *Force and Hembling's Case* in 4 Co. that the making of the Will is not the Will, but only the Commencement of it; the meaning of that is only, that it does not transfer the Interest and Property of the Thing devised; but still it is his Disposition till he revokes it. Now what Commencement has this Will as to these Lands? It cannot have a Commencement from the Time of making the Will, because the Testator had not the Estate at that Time. When then would you have this to be a Will? Must you stay till he has purchased Lands to make this a Will? Suppose he does, can a precedent Devise extend to them? Now his Act of purchasing those Lands, and his Act of disposing of them are two different Things, and are of different Natures. You must suppose that *eo instante* he purchases, he makes his Will, tho' made long before, which is absurd and repugnant.

The Law of England is plain as to this Point, by all the Precedents of Wills; and the Law is the same, both of Lands devised by Custom, as well as by Statute. There is no Will that I can find in any Plea or Entry, but it is said, that the Testator was seised in Fee of such and such Lands, and that being so seised he made his Will such a Day, and did devise, dispose and bequeath so and so; which plainly shew it was absolutely necessary he should be seised in Fee at the Time that he makes his Will; and of this there are Multitudes of Authorities. I shall name a few only, *Co. Ent.* 602, 664. And in *Rast.* 274. there is a Precedent of a Will of Lands devisable by Custom, that the Testator was seised in his Demesne as of Fee. 34 H. 6. 6. a.

Tho' the Forms of Pleading do not make the Law, yet constant Pleading of a Thing in such a Manner is a great Evidence of the Law; and this argues the Necessity of the Testator's being seised in Fee at the Time of making the Will. But it is objected, that Lands deviseable by Custom do differ from Lands at Common Law, because that they are deviseable as Goods and Chattels; and Appeal to the Custom itself, set forth in the Writ of *Ex gravi Querela*, in *F. N. B. b.* 199. *Old Edit.* Now it is said, that by this Custom it is lawful to devise Lands and Te-

nements



On 1. 1707
delivered the
Opinion of the
whole Court.

nements as Chattels; tho' the Testator has not the Possession of them at the Time of making the Will; and that a Man may dispose of his Chattels and personal Estate, that he shall for the future acquire, any Time after his making his Will, to the Time of his Death; and shall therefore dispose of these customary Lands in the same Manner.

In answer to this, I desire the Custom in that Writ set forth may be well considered, and then it will appear plainly, that the Custom is not general; that a Man so qualified may devise *Terras & Tenementa*, as he may Goods and Chattels; but it is *Tenementa sua*, they must be *sua* before he can dispose of them; they must be his Property before he can devise them away. Now if they be not *sua* at the Time of the devise, then he is out of the Custom, and his Will cannot be affected by it. It is true, personal Estate and Chattels may, by the Common Law, be disposed of before he has purchased, or had the Possession of them; and there are many Cases that make this out; but there is a great deal of Difference between real and personal Estate; for personal Estate and Chattels are transient and fleeting, and not at all fixt and permanent, as Lands are. Perhaps the greatest Part of a Man's Estate is in Goods to Day, and he may have a Mind to turn those into Money to Morrow; now would it not be hard he should make a new Will on every Alteration; for this the Necessity of Dealing and Traffick in the World would require a Man to make a Will every Day, if he could not dispose of his personal Chattels, because they have undergone some Alteration; this would be the greatest Perplexity in the World. But on the other Hand, Lands continue the same every Day, and will so to the End of the World. And as to real Estates, there is Time and Opportunity to make Settlements as he thinks fit; but of personal Estate, that is under a constant Variation, it is quite otherwise in Reason.

Again, as to personal Estate; the Law has not appointed any Person to succeed therein, where there is no Will, as it has the Heir in Case of Lands, but only now by Act of Parliament, there is an Administrator to be appointed;

but at Common Law it was not so; and where the Party Testator appoints an Executor, he takes under his Right of Disposition; when he is appointed Executor, he takes all, as being named Executor; and when the Testator gives Legacies out of it, it is in a Manner a Direction only to the Executor how he shall administer; for Legacies by the Will do not pass to Legatees in the same Manner as a real Estate; because, notwithstanding such Devise, the Property is in the Executor, and not in the Legatee, until the Executor do consent to the Legacy; but in a real Estate the Lands pass immediately to the Devisee. This makes a great Difference. The Law has appointed a Person in one Case to succeed, where no Will is, which is the Heir; but in the other Case at Common Law, no Person is appointed to succeed to the Possession of personal Estate, but it is left to the Testator's Discretion.

Suppose the Case was of a Devise of a real Chattel, and a Man should devise a Term of Years, that he had not at the Time of the Devise, but purchased some Time before his Death; I doubt whether that would be good; tho' this be not the Case, nor necessary I should give any Opinion in it, yet I make a great Doubt of it.

Suppose for the Purpose, one takes a College Lease, and another makes his Will, and should devise that Lease away to another, and afterwards the Testator should purchase that College Land, subsequent to the making of his Will, the Question is, Whether this would be a good Devise? And I am inclined to think, this would not be a good Devise. There is the Case of *Asby and Lever* in *Goldsb. 93*, comes up to this Matter: A Man makes his Will, having a College Lease, or other Lease, and devises this Lease to *J. Siles*, after the making of which Will he surrenders this Lease, and renews the Lease from the said College, suppose, and then dies; the Question was, Whether the Devisee should have this Lease? And it was held in that Case, that the Renewing the Lease was a Revocation of the Will; and that the Lease did not pass. This seems to be a very strong Case, as to this Point; and the Reason

son is plain, because the Estate was not in *Esse* at the Time of making the Will.

March 137. The Question was there, Whether a Term, not assented to by Executors, and which passed only as an executory Devise, could pass by the Will of the Devisee; and there it was held, it was only a Possibility, and that nothing passed by Will. And indeed how could he dispose of a Term that was not his, but another Man's; its hard to imagine such a preposterous Thing; but I shall not give any positive Opinion therein, this not being our Case. The Executor must Assent to a Legacy, else nothing passes; for nothing can pass immediately where a Term is devised. But this is enough to shew a Difference between a real and personal Estate; one is permanent and lasting, the other mutable and fleeting.

To make a Will to take Effect from the Purchase of the Estate, is repugnant to the Nature of a Purchase; for the Will gives it to another and his Heirs, and the Purchase gives it to himself and his Heirs; the Will gives it to his Wife, and the Purchase gives it to himself in Fee; so that here is a perfect Contradiction.

Now it is to be noted, there is no Republication; for if there had been a Republication, that would have done, and made those Lands pass; provided that all the Requisites and Circumstances, necessary to the Making of an original Will, within the Act of Frauds and Perjuries, had been observed.

Suppose a Man devises all his Land in Tail, and afterwards purchases other Lands, and dies before Republication, those purchased Lands will not pass; but if he republishes the Will in such Manner, and with such Circumstances, as are necessary to the compleat Execution of an original Will, then the purchased Lands will pass as by an original Will.

It is said indeed in *Brett and Rigden's Case*, that where a Man devises Lands in certain, as the Manor of *D.* or *White Acre*, and the Devisor has nothing in the Land at the Time of making the Devise, but does afterwards purchase the same, that such new purchas'd Lands should pass

*Plowd. 340.
&c.*

to

to the Devisee, because his Intent was manifest to pass it away; if that were Law, it is full against me, but I think that Case is not Law; 'tis only a Saying of Serjeant *Lovelace*, and the Case quoted in the Margin does not warrant any such Thing. I thought indeed, before I look'd narrowly into that Case, which is 39 H. 6. 18. that it had been so, but there is nothing in that Book to warrant it; nor is there any Thing like it in either of the Abridgments, either in *Fitzherbert tit. Devise 17. d.* or *Brook the same Title 15.* It is only a Note of two Judges Opinions. *Nota*; says the Book, *In the King's Bench per Yelverton and Markham, If a Man devises Land, and is disseised after that, and then dies, the Devise is void and cannot be made good; and the Reason is, because the Disseisin turns it to a Right, and is then only a Chose en Action, and cannot be devised away; and therefore, says the Book, it was held a good Plea against this Devise, that the Devisor did not die seised of the said Land.* But the Book goes on further, and says, *Suppose a Man is disseised, and then makes his Will, and devises Lands, and afterwards re-enters into those Lands, it is made a Question there if it be a good Plea to say, that the Devisor had nothing in the Lands at the Time of the Devise.* This is the Case put, and the Case meant, which is the Ground of the preceding Opinion; and it seems by that Book, that if he does re-enter, the Lands shall pass. And I am of Opinion, the Lands will pass if he re-enter; and the Reason is, when a Man is disseis'd, and he makes a Re-entry, that such Entry purges the Disseisin, and the Disseisee, by Relation to all Intents and Purposes, is in Possession from the Beginning; and for that Reason, he shall have an Action for the mean Profits, between the Time of the Disseisin and bringing the Action; and so is 38 H. 6. 27. 39 H. 6. 17. He may in such Case be justly said to be seised in Fee of such Lands, and therefore may dispose of, and devise the same away; because the Entry reverts the Estate, and he is now, in Consideration of Law, in Possession from the Time of the Disseisin, and therefore is intitled to the mean Profits, as tho' he had been actually in Possession all the while; but that is not this Case, for

for there the Devisor has neither *Jus in re*, nor *Jus ad rem*; for the Land is here purchas'd eight Years after the making of the Will.

Suppose an Heir that has nothing but a bare Right, should, during his Father's Life-time, make a Will, and devise all his Lands that he should have at the Time of his Death; would the Land, that came to him by Descent from his Father, pass by the Devise? No surely.

But then, Suppose a Man makes a Will of Lands in Reversion, expectant on an Estate-tail, or Estate for Life, and before his Death the Tenant for Life, or in Tail dies, without Issue, these Lands will pass, tho' a Reversion only at the Time of making the Will; because he is seised at that Time as much as he can be; and it is a certain present Interest, tho' to commence *in futuro*, and all the Estate that he could give, he intended him.

There was a Case in my Lord Bridgman's Time of *Davis* and *Kemp*; it was a Devise of Lands to two Persons, and their Heirs, and one of them dies, during the Life of the Testator; and the Question was, Whether the Survivor should take the whole or not? And it was held he should; which plainly shews 'twas a Will and Disposition from the Time of making it.

See 1 Chan. Cases 191.

Supposing *A.* has a Manor, and makes his Will, and devises this Manor, and before the Death of the Testator, a Tenancy escheats to the Lord, and after that the Testator dies; the Question is, Whether the escheated Tenancy shall pass? And I hold, that the Tenancy, that escheated between the Making of the Will and the Death of the Testator, shall pass; because the Manor is devised, and that is Part of it; for the Tenancy is not devised as a distinct Thing, but as a Part of that whole which he could devise.

I look on it to be very plain, and to be my Lord Coke's Opinion in *Butler* and *Baker's Case*, in the 3d Report, that a Devise is a Disposition; and that Case was so adjudged in the Exchequer Chamber by all the Judges in England, and that a Custom to devise ought to be construed the same as on the Statute.

L i

Therefore

Therefore for these Reasons I hold, that Judgment ought to be given for the Defendant: *viz.*

1. In regard it is a Will at the Time of the Making.
2. Inasmuch as the Testator has not Power to give what he had not.
3. The constant Manner of Pleading shews the Necessity of the Testator being seised at the Time of the Devise.
4. A Devise of Lands is not comparable to a Devise of personal Estate; because a personal Estate is altering every Day.
5. Because a Devise is repugnant to the Nature of a Purchase: A Purchase is to the Devisor and his Heirs, and the Devise is to another, and her Heirs.
6. Because there is no Case, nor Authority in Law, to warrant any contrary Judgment.

Quere, If there is not a Case in *Ventris* to this Purpose. And *Note*, That at this Time, there was another like Case depending in C. B. and the same Points debated and afterwards adjudged; which see hereafter reported in *Mish. Hill, Term 6 Annæ, N. 12. Archer vers. Bokenham. L. 148.*

Vide ante
Passb. 5 Annæ,
N. 7.

Keeble against Hickeringill.

The Judgment of the Court, delivered by Holt Ch. J.

Case for
Disturbing his
Decoy.

(10.) **T**HE Declaration is, That the Plaintiff was lawfully possessed of a Close of Land, and a Decoy therein; and that the Defendant knowing it, and intending to deprive him of the Benefit thereof, and to hinder the Ducks from coming to the Decoy, did, on divers Times, shoot off and discharge Guns, &c. maliciously; And a Verdict is for the Plaintiff.

1. A Decoy in
Nature of a
Trade.

1. This Decoy is a Benefit to the Plaintiff, and in Nature of a Trade; and there is the same Reason he should be repaired in Damages for his Decoy, as for any other Trade. 'Tis true, there may be a *Dammum sine injuria*, *11 H. 4. 44 or 47.* If a Man set up the same Trade as mine, in the same Town, this is a Damage to me, but it

it is *fine injuria*; for 'tis lawful for him to set up the same Trade if he pleases. 23 or 19 E. 3. fo. 18. But this Action is brought for disturbing the Wild-Ducks coming to his Decoy; and so is in Nature of disturbing him from exercising of his Trade; and therefore he need not set forth how many Ducks, which was the Exception taken at the Bar. See 2 Cro. 126, 123. Owen 109. Also this is not like the Case in 5 Co. which was *Pisces suos capit*, and did not say how many, nor of what Nature. For in this Case 'twas impossible to say how many, because the Action is brought for disturbing them coming only to his Decoy.

2. The Stat. 25 H. 8. c. 17. does enumerate what is Wild-Fowl; so that the Law takes Notice of Wild-Fowl, and shews what it is; and we must take Notice of it too, or else how can we obey this Law?

2. The Law takes Notice of Wild-Fowl.

3. There is a Difference between this Case and that of Franchises. For if I have a Fair, Market, Ferry or the like, granted to me, no Man else shall use another to my Damage; for these are of a Publick Nature, and divers Persons besides the Grantee have an Interest in them; and if I do not repair my Ferry, &c. I am indictable; and therefore no Man shall (erect and) use another Ferry, &c. to my Damage. But any Man may freely use a private Franchise, as a Park, Warren, Way, &c.

3. A Difference inter Publick and Private Franchises.

4. This Case is not like that in 5th Coke, about taking Fish out of a Pond, &c. For in that it was Trespass, to have Damage for the Thing taken; and therefore it was necessary to set out how many, and of what Nature. But this Action is a Trespass on the Case, to have a Recompence for a consequential Damage or Injury; and is for hindring me from exercising my private Right: For those Ducks might have come to my Decoy, to my Benefit, which were here hinder'd, to my Damage, &c. And according to this, he cited a Case in one of the Year-Books, where an Action was brought by the Owner of a Market, for hindring Horses being brought to the Market, and adjudged that it well lay, tho' it did not appear certain that any Body would have bought (brought) them. And so where a Person is hinder'd from going to a Fair, Market, &c.

4. And inter this Case and that in 5 Co.

Uc. For it is injurious, to hinder a Man from going where he has a Right to go. (*Quære, If not so where one is hinder'd from doing what he has a Right to do, tho' no special Damage.*)

Anonymus.

An Officer
chosen in a
Corporation
refuses, &c.

(11.) **S**IR *Edward Northey* moved for an Information against a Man, chosen of the Common Council of *Bristol*, who refused to accept the Office, and supposed, (suggested) That in case they might refuse to accept it, the Corporation would soon be at an End. He also said, That the Sheriffs were always chosen out of the Common Council: And that the Court would take Notice of a Common-Council Man as of a publick Officer, and that a Corporation is a Part of the Publick Government.

But *per Holt Ch. J.* That is *quoad* the Place where they have a Power as a Corporation to make By-Laws; and they should make a Law to inflict a Penalty on him that refuses, and this is the proper Way. *Sed adjournatur.*

Anonymus.

No Prohibition
to Inferior Courts,
where they
have Jurisdiction.

(12.) **N**OTE; *Holt C. J.* and all the Court agreed unanimously, That if an inferior Court has Jurisdiction over the Cause of Action, no Prohibition ought to go, upon a Suggestion, that the Cause of Action arose out of the Jurisdiction; but you ought to plead to the Jurisdiction, and if they refuse such Plea, then move for a Prohibition. And *Holt* said, There have been Cases to the contrary, but the Law is now settled otherwise; and if a Person pleads in Chief, he shall never assign this for Error, if such Inferior Court have Jurisdiction of the Thing.

Rich

Rich against Wilks.

(13.) A Covenant was, That the Defendant should Dance, Sing and Act under the Society of Comedians, and obey Orders; and should act and be assisting to no other Theatre, but what was appointed by Mr. Rich: And the Breach assigned was, That he acted at Oxford, without the Consent of the Plaintiff. The Defendant demurs to the Declaration; and

Covenant, and Breach assigned after the Declaration.

Pengelly for the Defendant excepted to the Declaration. 1st Exception.

1. That it is set out with *Post hac*, &c. which must be construed from the filing of the Declaration, (or bringing the Writ) and it should have been *Post confectiorem indenturæ*, i. e. That he the said Robert Wilks did covenant that he, for five Years after the making, would not Act, &c.

2. This Breach is not well assigned; because it does not appear, that the Play he acted was Publick, and if not so, it was no Damage to the Plaintiff. And the Design of the Covenant was not to restrain any Dancing, Acting, &c. unless where it drew others (to lay out their Money at other Play-houses) from the Play-house of Rich. 2^d Exception.

Salkeld contra. This Breach is assigned according to the Covenant, and 'tis not material whether the Acting were for Gain or not. But take it to be for no Gain, 'tis yet prejudicial to the Plaintiff; for no Body will see his Play, when they can see another for nothing.

Holt and Powell. That *quod post hac non ageret*, &c. in the Declaration should have been *Quod abinde non ageret*, &c. Now *post hac* was right in Recital of the Covenant, but wrong in the Declaration; because *post hac* must be taken to be after the present Time; so that the Breach is laid to be after the Declaration. But it was adjourned; tho' the Court thought it could not be made good.

But for the Court, 'tis well enough, and the Plaintiff has his Action to bring his Action upon either. See 2^d Inst. 3. 20.

M m

Love

2^d Inst.

Love against Dr. Bentley.

Parishioners
have Right
to view Pa-
rish-Books.

(14.) **T**HE Solicitor General moved for a *Mandamus* to the Parish of *St. Clement's* in *Cambridge*, to let the Defendant have the Sight of the Parish-Books. (It was in Action brought for a false Return to a *Mandamus*, for *Dr. Bentley* to swear the Plaintiff a Church-warden.)

Eyre contra. This is not like the Case of a Corporation which is of a Publick Nature, and cited a Case to that Purpose.

Holt Ch. J. They ought to have a Sight of the Books; and this Case is not like the Case cited by *Mr. Eyre*, which concerned the Title of an Estate; and yet in the Case of a Copyhold, every Copyholder has an Interest in the Rolls; so here, every Parishioner has a Right to the Parish-Books. And the Court ordered Copies of the Books to be given, which *Powell* said would be good Evidence, (*i. e.*) against the Plaintiff, but not for him, as I apprehend; because in this Case he has the Custody of the Books themselves, and may produce them in Evidence, if he pleases. See *Pasch. 6 Annæ, N. 5.*

Squire against Tendon.

A Sum certain
a good Consi-
deration for an
Incertainy.

(15.) **I**N Case, the Plaintiff declares, that the Defendant being indebted to the Plaintiff in 10*l.* for Horse-meat, in Consideration thereof, promised to pay to the Plaintiff as much as he should deserve. And after Verdict for the Plaintiff, *Fortescue (John)* moved in Arrest of Judgment; and excepted, That a Sum certain could not be a Consideration for an Incertainy. Suppose the Jury had given 11*l.* 10*s.* that could never be a good Consideration for more.

But *Per Cur'*. 'Tis well enough, and the Plaintiff has Election to bring his Action upon either. See *Style* 320.

Roll 28.

Savage against Walthew.

(16.) **I**N an Action on the Case by a Carrier against his Servant for losing Goods, &c. Exception was taken, That this Action lies not, except it appear that the Carrier had received Damage by being sued. For this Action lies only in respect of the Damage the Master sustained. See *Cro. El.* 53, 461. *Cro. Car.* 187. *contra.* 'Twas further objected, That if this Action lies, the Defendant might be twice charged, *i. e.* by the Master and by the Owner.

Cafe by a Carrier against his Servant lies not. 2

Holt Ch. J. Not so, unless there be an actual Conversion; for the Owner of the Goods has an Action against the Servant only in Case of a Conversion. And the Master has a special Property, in the Goods and may maintain Trover, and the Master is liable to the Owner, by Reason he was intrusted by him. Besides, there ought to be a Negligence shewn in the Servant, to make him liable to this Action, for this amounts only to a Bailment of Goods, where if Thieves break in and steal them, he shall not answer it. And Judgment *Nisi* within three Days.

Modely and his Wife Executors vers. York.

(17.) **I**N an *Assumpsit* by an Executor, for Money received after the Death of the Testator, if the Executor be nonsuit he shall pay Costs. For the Law gave this Privilege to Executors, of not paying Costs, only where the Cause of Action accrued in the Testator's Life-time; and there, because it could not be supposed that the Executor was consant, or privy to the Acts of the Testator.

Executor to pay Costs, where Money received after Testator's Death.

(18.) **I**N *Execution* the Case was this: The Assize began on the Monday, and the Defendant died the Day before, and yet a Trial was had, and a long Defence, and yet a Trial for the Plaintiff; and now moved for Judgment. *Mich.*

Mich. Term. 1707.

6 *Annæ Reginae in B. R.*

Queen against Simmons.

Order of Bastardy.

(1.) **M**OTION to discharge a Person committed, by the Justices at their Sessions, on the 18 *Eliz. c. 3.* The Statute says, *That the two Justices, if they order a Person to keep a Bastard-Child, may commit him, unless he gives Security. 2 Bulst. 341.* And 'twas objected, that the Justices, and not the Sessions have the Power in this Case to commit, &c.

Powell. Suppose he gives Security to abide the Order of two Justices, and that this Order is confirmed at the Sessions, cannot they commit him for disobeying it?

Holt Ch. J. No they cannot; they must proceed upon the Security. *Answer,* But here is no Security given. In this Case the Man kept out of the Way, so the two Justices could neither commit him, nor take Security of him; but they make this Order upon him, and then he Appeals to the Sessions, and the Justices there order him to be committed. The Order was quashed; but the Court bound him over to appear at the next *Quarter-Sessions.*

Falmouth against Strode.

Discontinuance by Death.

(2.) **I**N Ejectment the Case was this: The Assises began on the *Monday*, and the Defendant died the Day before, and yet a Trial was had, and a long Defence, and a Verdict for the Plaintiff; and now 'twas moved, that Judgment

Judgment should be arrested. 'Twas objected, That this is Matter of Fact, and not assignable after Verdict, but that they ought to bring a Writ of Error.

Holt Ch. J. If he had died the Day the Assises began; tho' the Cause had been tried after, the Trial had been good, tho' he had died at one a Clock in the Morning; for there is no Fraction of a Day, according to *Shelley's Case* in 1 Co. In which Case my Lord *Hobart* said, any Man, as an *Amicus Curie*, may inform the Court of such an Error. *Adjournatur.*

Queen against Woodward, &c.

(3.) **I**NDICTMENT against several, for intending to defraud A. of his Money; and that they threatned to send him to *Newgate* by Colour of a Warrant, and to indict him of Perjury, unless he would give them Money and a Note; which he did through their Threats.

Indictment of Extortion.

Darnel urged, That this was no Offence indictable, but 'twas over-ruled. Then he took Exceptions to the Indictment. 1. That 'tis not aver'd, he had no Warrant to carry him to *Newgate*. 2. Neither is it averred, That he is Not guilty of Perjury. 2 *Roll Rep.* 263. 3. That 'tis not averred, That any Money was actually paid. *Sed Cur' contra.*

Holt Ch. J. Every Extortion is an actual Trespass, and an Action of Trespass will lie against a Man for frightening another out of his Money. If a Man will make use of a Process of Law to terrify another out of his Money, 'tis such a Trespass as an Indictment will lie.

Judgment for the Queen.

Anonymous.

(4.) **S**IR *Edward Northey* moved for a *Mandamus* to the Surrogate of the Bishop to grant Administration to B. The Case was, That Administration had been com-

Mandamus to grant Administration.

N n

mitted

mitted to one who died, and made an Executor, who would have had it committed to him, and not to the next of Kin to the Intestate.

Holt Ch. J. It cannot be, but it must be committed to the next of Kin to the Intestate. And granted a *Mandamus* for that Purpose.

Ludlow against Browning.

Testator's Estate not liable to a Commission of Bankruptcy against the Executrix.

(5.) **T**homas Walker made his Will, and his Wife Executrix thereof; she married a Bankrupt. *Browning* the Defendant was indebted to *Walker* by Bond, and the Debt becoming due, the Commissioners assigned that Debt, and 'twas urged, that this Debt is not assignable by the Commissioners of Bankruptcy; for 'tis a Debt due *in auter Droit*, and not to the Executrix in her own Right, &c. and that 'tis not forfeitable by her or her Husband. 10 E. 4. 1. *Kelway* 64. b. *Cro. Car.* 464. 1 *Jon.* 386. *Cro. Car.* 208, 218. 1 *Lev.* 17. *Raym.* 67, &c.

Parker Serj. The Question is, whether the Commissioners can assign a Debt due to the Bankrupt's Wife, as Executrix to another? I agree 'tis not forfeitable by Outlawry, &c. of the Wife or Husband. But a Thing may be grantable or assignable tho' not forfeitable; his Grant can convey away the Goods, tho' he cannot forfeit them. The Statute enables him to grant or assign *Choses in Action*. Whatever the Man himself can grant, the Commissioners may. If a Man grants *omnia Bona & Catalla sua*, a Term in Right of his Wife will pass.

Kelway 64.
2 *Roll Abr.* 58.

Holt Ch. J. This here is a *Chose in Action*, and *in auter Droit*, and asked if he had any more to say. *Responsf.* 2 *Cro.* 318. And as to this being a *Chose in Action*, there is no Difference: For they have the same Power over those as over Goods, &c. *Noy* 142. *Palm.* 505.

Whitacre. There are no Words in the Statute that empower the Commissioners to assign the Estate of another Man, but of the Bankrupt's only.

Holt. This in Truth is the Estate of the Testator, and they have no Authority to assign any Thing whatever but the Bankrupt's Estate; the Power the Husband has of disposing of it, does not make it his till he has disposed of it.

Powel Just. Brother Parker, you have a hard Case to maintain; the old Books do indeed say, If a Man grants *omnia bona sua*, such Things in Action shall pass, because the Property must be in Somebody; but the Law has been ruled otherwise since; and therefore, if he has any other Goods, the Statute is satisfied; and by his Grant of *omnia bona sua*, none but what are really his own shall pass; and these Words shall not pass away those Things which would make him a Wrong-Doer, and in this Case commit a *Devastavit*. (See Knight and Gould's Case in Levinz.) You would have the Commissioners be the Testator's Executors, but they are only to pay the Debts of the Bankrupt, but not the Debts of the Testator. *Adjournatur*.

Tulley against the Bail of Vavasor.

(6.) MR. Raymond moved to amend a *Scire Facias* against Bail, upon a Writ of Error brought on a Judgment in the Common Pleas, where the Clerk who had the Judgment before him, in which the Plaintiff's Name was James, and the Clerk had made it Randal, which was a Variance from the Record; for the Judgment recorded was misrecited in the Writ. Scire Facias amended.

Mr. Eyres. There was a Judgment recovered against Vavasor, and that Judgment was affirmed here with Costs, *pro dilatione Executionis*; and the only Thing they can amend by, must be the Writ of Error.

Holt Ch. J. cited a Case, where a Man can bring a Writ of Error given for himself. 2 Ventr. 104, 105.

Raymond. 'Tis only *Vitium Clerici*, and a meer Mistake in him, in not pursuing his Instructions; and such Mistakes may be amended after a Writ of Error.

Holt. Holt.

Holt. If it be amendable at one Time, 'tis so at another; if it may be amended before a Writ of Error, it may be amended after a Writ of Error brought.

Powell Just. A Man can never bring a Writ of Error to reverse a Judgment that is given for him; for there must be a Damage a *Gravamen* recited, which cannot be of a Judgment that is given for him. *Quero de hoc?* But on the whole, the Court held, That the Writ of *Scire Facias* in this Case was amendable.

Note: The Mistake in the *Scire Facias* was, The Clerk had made it reciting, *That whereas Randal had recovered against James; whereas the Judgment was, That James had recovered against Randal.*

Queen against Hurst.

Ale-houses.
Indictment
quashed.

(7.) **A**N Indictment was for keeping an Ale-house without a Licence. Mr. Edward Winninton moved to quash it, because the Statutes of -- Ed. 6. and 3 Car. 2. have carved out particular Penalties.

And by the whole Court it was quashed accordingly.

Vide Hill.
7 Anne, N. 7.

Clerk against Price, (a Parson.)

(8.) **P**ROhibition moved for to the Spiritual Court for Words, which in the Label were laid to be, That the said Price behaved himself proudly and insolently; and That he was an impudent ignorant Blockhead; and that he also said and declared, That the Advice and Exhortations, and other Spiritual Directions of him the said Price from the Pulpit, are not fit to be taken; and That he was not fit to give the Sacrament. And That he the said Clerk, speaking to a third, said, you would not receive the Sacrament from such a Puppy as the said Price was, was you to live never so long in his Parish.

Serjeant Parker, (now Sir Thomas) To shew Cause why a Prohibition should not go, said, These were not Words of Heat, but of Deliberation, and highly touched him in

his

his Function; and cited the Case of *Crandon* and *Walden*, 3 Lev. 17.

But *Holt* Ch. J. said, (to which the Court did not disagree) That tho' these Words did reflect on him in his Profession, yet seeing they do not charge him with any Thing for which he is obnoxious to the Spiritual Court, therefore a Prohibition was granted; and 'twas ordered to come before this Court, by Declaration and Demurrer.

The Queen and Mayor of Thetford.

(9.) **T**WAS resolved in this Case, that in a Motion for an Information against *A.* an Affidavit in a Motion against *B.* cannot be read; because the Swearer cannot be prosecuted for it if false. *Affidavit in a different Motion cannot be read.*

Davis and Daveril.

(10.) **I**N a Motion for a new Trial, on Suggestion, that the Defendant did arrest and imprison one of the Plaintiff's Witnesses till the Trial was over; adjudged to be good Cause of granting a new Trial. New Trial

The Queen and Bonnet.

(11.) **M**R. *Eyres* moved to quash an Order made by two Justices of the Peace; because the Order was said, to be made *coram Custodibus Pacis nec non Justiciariis, &c.* and all Justices of the Peace are Keepers of the Peace; but all Keepers of the Peace are not Justices: And he further argued, that they have not been called *Conservatores Pacis* only since the Stat. 34 Ed. 3. Cap. 1. But the Court over-ruled his Exceptions, and adjudged the Order good. *Conservatores Pacis* a good Name for Justices of the Peace.

The Queen and Hungerford.

Information
for refusing to
act as Com-
mon-Council
Man, denied.

(12.) **A** Motion was made for an Information, in Nature of a *Quo Warranto*, against a Common-Council Man of *Bristol*, for refusing to take upon himself the Office, after he was chosen. But the Court denied the Motion; and said their Remedy was to proceed by their By-Laws in order to compel him; he not being such a Publick Officer as a Sheriff, &c. But if they had applied to the Court for a *Mandamus* they should have had it.

The Queen vers. Rudd.

Writing an
obscene Book,
not indictable.

(13.) **P**ER Cur'. A Crime that shakes Religion, as Profaneness on the Stage, &c. is indictable; But for writing an obscene Book, (as that intituled, *The fifteen Plagues of a Maidenhead*,) is not indictable, but punishable only in the Spiritual Court.

Etherington vers. Reynolds.

Removal of
Records, &c.

(14.) **A**N *Indebitatus Assumpsit* and *Insimul Computasset* was brought against the Defendant *Reynolds*. They plead in Abatement, that she was a Feme Covert; the Plaintiff replies, that he enter'd a Plaint against her when Sole, in the Palace Court, which she removed into B. R. by *Habeas Corpus cum Causa*, and put in Bail as a Feme Sole; and the Plaintiff delivered her a Declaration agreeable to the Plaint below; to which Replication the Defendant demurred.

Pengelly for the Defendant, That she having removed herself up by *Habeas Corpus*, and having put in Bail to answer a Declaration here, nothing of the Proceeding below is removed; as in Case of a *Certiorari* or *Recordari*, in *Surs* and *Turner's Case*, *Hill. 3 Annæ Regine*; and the Plaintiff

Plaintiff ought to have declared against her, as she was at the Time of the Declaration delivered, and not as a Feme Sole, according to the Plaint below.

Holt Ch. J. If an *Indebitatus Assumpsit* be brought in an Inferior Court, and the Defendant removes it up by *Habeas Corpus*, and to the Declaration above pleads *non Assumpsit infra sex annos*; the Plaintiff may reply, that a Plaint was delivered in an Inferior Court within six Years; but to this the Plaintiff cannot reply, that the Defendant was Sole when the Plaint was levied below.

The Court was inclined to give Judgment for the Defendant; but as an Indulgence for the Equity of the Cause, 'twas adjourn'd to *Hill*. Term next. Judgment.

Lawn and Sawbridge.

(15.) **I**N a Writ of Error out of C. B. the Defendant pleads *in nullo est Erratum*; 'twas in a *Scire Facias* against Bail, and the Plaintiff assigned for Error the Want of a *Scire Facias* on the Roll. Errors confessed by Pleading in *nullo est Erratum*.

Lutwich for the Plaintiff said, that the Defendant's Plea confessed the Error assigned.

Eyre for the Defendant argued, that 'tis not like the Case where you proceed on an Original, and the Want of an Original is assigned for Error; for then the Record may be removed without the Original; but in this Case, nothing can be removed but the *Scire Facias* it self, and so 'tis repugnant to say there is no *Scire Facias*.

Resolved by *Holt Ch. J.* That this Error might be assigned, as well as the Want of an Original Bill; and that by Pleading *in nullo est Erratum*, the Plaintiff has confessed the Error: But the whole Court, *viz.* *Holt Ch. J. Powell, Powis* and *Gould* agreed, That a *Certiorari ad Informandum* *Certiorari.* *Consentiam Curie* might be awarded.

Which was done accordingly.

Hill.

Hill. Term. 1707.

6 *Annæ* Reginae in B. R.

Alton against Farvis.

(1.) **T**RESPASS for entering his Close, and taking Cattle; the Defendant justifies by several Judgments in a Court-Baron, where the Plaintiff having levied a Plaint against the Defendant; whereupon Judgment was for the Defendant, and Costs given him; and thereupon the Defendant, by Virtue of a *Levari Facias*, took the Cattle and sold them; and for this the Plaintiff brings his Action. And the Defendant demurs to the Declaration.

Raymond for the Plaintiff insisted, That they could not sell the Cattle upon a *Levari* in a Court-Baron, without alledging a Custom for so doing; and cited *Bro. Abr. Execution* 80. *Lutw.* 1524. *Dalt. Sher.* 419. *Lutw.* 1410. *Kel.* 106. The Bailiff ought to keep the Distress till the Parties agree.

Lutwich contra. If the Bailiff cannot sell, 'tis to no Purpose to take Execution; but the Words of the Writ are, *Quod Levari Facias*, so that he have the Money at the next Court, which cannot be, unless he may sell; and he cited *Bro. tit. Execution* 26. 2 *Lev.* 81. 3 *Keb.* 126. 8 *Co.* 41.

Raymond replied, That *Bro. Execution* 26. is no Judgment, but only an Inference; and is precedent in Time to *Bro. Execution* 80. *Q.*

Holt Ch. J. Distraining is Levying. (*Q.*) If a Man distrains for Rent, and impounds the Distress, and then brings

Debt

for the same Rent, the Defendant may plead *levied by Distress*. As to the Selling by the *Levari*; 'tis always alledged in Pleading to be *secundum Consuetudinem Manerii*, which is the Custom in most Manors, being so general, that any Court-Baron, &c. may plead it as a Custom: *Adjornatur*.

Archbishop of Canterbury against Willet.

(2.) **D**E.B.T. upon an Administration-Bond of 3000*l*. and on Oyer of the Condition it was to cause a true Inventory to be made, and to exhibit it into Court, and well and truly to administer, and to render an Account, and to deliver the rest as the Court should adjudge. The Defendant pleads, That he had exhibited an Inventory duly administer'd, and that he never was cited to Account, nor was there any Adjudication that he should dispose of the rest; and the Question was, whether an Administrator is bound to render an Account, tho' he never was cited? And Judgment was, That he is bound to put in an Account before the last Day in the Condition, at his Peril.

A bad Replis-
cation may
destroy the
Cause of Ac-
tion.

Administrator
bound to Ac-
count without
Citation.

Holt Ch. J. That an Executor is bound to Account. See 21 E. 3. 9 Co. *Henley's Case*. If an Executor had been summoned by a Creditor, and made his Account, the Ordinary could not hold Plea of it; because the Ordinary cannot relieve. 2 *Inst.* 600. *Noy* 78. But he must take the Account, as the Executor has made it upon Oath: But if a Legatee comes, he may unravel the Account, because 'tis the only Court for him to sue him in; and therefore he is not bound by that Account. But if the Executor will pay him his Legacy, then he cannot compel him to exhibit an Inventory or to Account; because he has the End of his Suit. *Raym.* 407. The Stat. 22 Car. 2. *Raym.* 470. of Distributions, makes the next of Kin Legatees. And before the making of this Statute, *Co. Ent.* 128. is, That the Administrator should Account when he was thereto required. He is now bound to do this at his Peril, un-

less he can shew some Cause to the contrary: And here he ought to have shewn some Reason why he did not. Whenever a Man is bound in a Bond to do an Act that is possible (especially if 'tis to be done at a certain Time, or Place,) he is bound to do it at his Peril. *Hob.* 132 or 134. So it is in a Mortgage; and when a Man is bound in a Bond to do an Act that cannot be done, as to give an Account at a Court such a Day, &c. he ought to plead, That there was no Court held that Day, &c. and that he was ready at the Place, and had done all that he could. See 13 E. 3. 13. 14 E. 3. 17. 18 E. 3. 70. *Lutw.* 182. which *Holt* took to be a very good Case, 8 Co. 120, 130. which Cases were cited to shew, That if the Plaintiff makes a bad Replication, he may destroy his Cause of Action; and that to the Case seemed to be here. And therefore ordered it to be spoken to again next Term, *quoad* this Matter.

But the Court were clear, That the Bar was naught; and that he was bound to Account, without Citation, at his Peril. And by *Powell* Just. He has here confessed a Breach, because he says, He was never cited, and so it may be good, *quoad* the Defendant's Confession, tho' the Plaintiff has not shewn any Breach. *Adjournatur.*

Asser against Wallis.

Indeb' Assump.
A. having a former Wife living, marries another, who has Lands, &c. which he lets, and receives the Rents, &c. the 2d Wife brings her Action and recovers.

(3.) A Man having a Wife in England goes to *Jamaica*, and there marries a rich Woman, and lets her Lands, reserving Rent to himself, and received the same divers Years. But after some Time, they both coming into *England*, she perceived he had another Wife living; and thereupon brings an *Indebitatus Assumpsit* against him for the said Rents, as so much Money received by him to her Use. And at the Trial at the Guild-hall *London*, this Point was saved to be argued by Counsel, Whether an *Indebitatus Assumpsit* would lie in this Case? Which was argued this Term.

Dee the Common Serjeant said, 'Twas like the Case of a Disseisee, who could not maintain an *Indebitatus Assumpsit* against

against the Disseisor; as for Money received to his Use; and in this Case there was another and a proper Action; For if the Rents were received with her Consent, she might have an Action of Account against him as Receiver; if without her Assent, Trespass lies.

Eyre also for the Defendant said, That an *Indeb' Assump'* will not lie, but where Money is due on some Contract; therefore where one Man enters on another, and sells his Goods, &c. he who has the Property in them cannot have an *Indebitatus Assumpsit* for the Money received, as for Money received to his Use; but must have his Action as for a Wrong done, viz. Trespass, Assize, &c.

Whitacre for the Plaintiff, That the Action lies; for the Plaintiff was consenting, and often present when the Money was paid. That where Debt will lie, an *Indebitatus Assumpsit* will also lie in many Cases, so not confined to a particular Action. But here it cannot be said, That the Defendant was a Wrong-Doer, because it was done with her Consent: Besides, an *Indebitatus Assumpsit* will lie, though there was no Contract; as for the Profits of an Office wrongfully received, tho' received by one who pretended a Title. See 9 Co. The Case of the City of London. 2. Cro. Eliz. 82, 83.

Darnel also for the Plaintiff, That there is no need of a Contract to maintain an *Indebitatus Assumpsit*; for where Money is over-paid, this Action will lie for the Surplus. If the Wife lends her Husband's Money to J. S. the Husband may have either *Indeb' Assump'* (or Trover. Q.) If Rents are received by false Tokens, either Account or *Indebitatus Assumpsit* lies. 3. Mod. 260.

And by the whole Court 'twas agreed, That an *Indeb' Assump'* would well lie. But Holt Ch. J. said, That Trover would not lie in this Case, because she was never possessed of the Money; and when she married the Defendant, she consented, that he should manage her Estate. He cited a Case in 1 Co. where if Money be over-paid, either Debt or *Indeb' Assump'* lies. If two lay a Wager, and stake down the Money, the Winner shall have an *Indeb' Assump'* against him that holds the Stakes, as for Money received to his Use. And Judgment for the Plaintiff.

Archer

Archer vers. Bokenham, in C.B.

See the like
Case before in
Trin. 6 Annæ,
N. 9. Brun-
ter v. Cook.
Lands purcha-
sed after a
Will made,
pass not by it.

(4.) EJECTMENT was brought for a House in *Kent* by *John Archer*, on the Demise of *Robert Bokenham*, against *Frances Bokenham* Widow; and on Not guilty pleaded, there is a special Verdict, wherein the Jury find, That as to a Moiety of the said House the Defendant is Not guilty; and as to the other Moiety they find, That *William Bokenham* Esq; late the Husband of the Defendant, being Commander of their late Majesty's Ship the *Grafton*, on the 3d of May 1692, duly made his last Will and Testament in Writing, which they find in *hec Verba*, It recites, that he was then bound out to Sea, and then says, *I do hereby give, devise and bequeath unto my well-beloved Wife, Frances Bokenham, all such Sum and Sums of Money as now is, or hereafter shall grow due to me from their Majesties for my own and Servants Service, either by Sea or Land: As also all such Sum and Sums of Money, Lands, Tenements, Goods, Chattels and Estate whatsoever, wherewith at the Time of my Decease I shall be possessed or invested, or which shall then, or of right doth appertain unto me: And I do hereby nominate and appoint her the said Frances Bokenham, my well-beloved Wife, to be the whole and sole Executrix of this my last Will and Testament.*

They further find, That the Testator, at the Time of the Making of the Will, was not seised of any Lands whatsoever; but that afterwards by Deeds of Lease and Release, bearing Date 26th and 27th Days of February 1693. Sir *John Franklin* and *Thomas Halsey*, being seised in Fee of the other Moiety of the said House, conveyed the same to the said *William Bokenham* and his Heirs, whereby he became seised, and so died without Issue of his Body.

They find, that the House aforesaid is held in Socage, and is of the Nature of Gavelkind, and devisable by the Custom of *Kent*; and to be divided amongst the Heirs Male, by Hereditary Right.

They

They further find, That the Testator had two Brothers, *Robert* Lessor of the Plaintiff, and *Harry Bokenham*, who was then dead, and had left Issue of his Body *Anne* an Infant; and that *Robert* and *Anne* were Heirs at Law to the Testator.

That *Robert Bokenham* entered into the said Moiety, and demis'd to the Plaintiff, upon whom the Defendant the Devisee entered; But whether the Defendant be culpable, they desired the Opinion of the Court.

Lord Ch. Just. Trevor delivering the Opinion of the whole Court.

The Question is, whether these Lands, (that is the Moiety nam'd in the Special Verdict,) did well pass by the Will to the Defendant *Frances Bokenham*, or not; for if they do not pass, then this Moiety belongs to the Lessor of the Plaintiff.

And we are unanimous of Opinion, that those Lands do not pass to the Defendant by this Will.

This Question, touching the Validity of this Will, doth depend on the Consideration of two Matters.

1. On the Consideration of the Statute of Wills 32 H. 8. which was made to enable Persons to devise Lands by their last Wills.

2. On the Consideration of the Custom of Gavelkind, which is particularly found in this special Verdict.

In the first I will consider, whether the Statute doth enable any one to devise Lands he is not Owner of, nor has any Interest in, at the Time when the Will was made, but does purchase Lands in his Life-time after the making such Will.

This depends on the Construction of that Act, which says, *That all and every Person and Persons having Manors, Messuages, Lands or Tenements, shall have full and free Liberty to dispose and devise the same by his last Will and Testament.* Whether the Word, *Having*, doth make it necessary that the Testator should have the Possession of and Interest in the Lands, at the Time of Making his Will? Or, Whether it be sufficient if he have or purchase the

Lands at any Time after the making his Will, and before his Death?

Now in order to come at the Meaning of this Statute, I will suppose this Act lately made, and that there had been no Construction made thereof before, but that the Question was intirely new and undetermined, and that it was now *res integra*; What would then be a reasonable Construction of those Words of the Act?

And in the next Place, I will consider what Construction this Act ought to receive, as it has been already expounded and determined, and from the Consequence of such Determination.

Now as to what would be a reasonable Construction, supposing it were to be made *de novo*, and to be now originally expounded,

I am of Opinion, it would be a very reasonable Construction, that this Act should not extend to enable any Person to devise any Lands he has not, nor is Owner of at the Time of making his Will, unless he republish it; which is the same in Substance as new making it.

The general Rule in Exposition of all Acts of Parliament is this, that in all doubtful Matters, and where the Expression is in general Terms, they are to receive such a Construction which may be agreeable to the Rules of Common Law, in Cases of that Nature; for Statutes are not presum'd to make any Alteration in the Common Law, further or otherwise than the Act does expressly declare; therefore in all general Matters the Law presumes the Act did not intend to make any Alteration; for if the Parliament had had that Design, they would have express'd it in the Act.

Now how will the Common Law influence this Matter before us?

First, It is plain by the Rules of the Common Law, that is, such Rules as are to govern Conveyances and Dispositions of Estates; the Law did never allow any Person, by any Conveyance at Common Law, to dispose of the Lands he had not, or had no Right or Interest in at the Time of making and executing such Conveyance.

And so is 1 *Inst.* 265. It is there said, and was never yet denied, *If one Release all the Right he has, and all the Right which he should or could have for the future, tho' in express Words which sufficiently shew the Intent of the Party, yet such Release is void, &c.* And this was never contradicted by any one.

However there are some Exceptions to this Rule as to Releases of future Rights; that is, that in some Cases a Man may release a future Right, tho' by the bare Release it can never pass; as 1 *Inst.* which I mentioned before: If there be Father and Son, and the Son disseise the Father, and being in Possession makes a Feoffment in Fee, in the Life-time of his Father, tho' no Right or Estate is yet descended upon him from his Father; yet this Feoffment will bar him of this future possible Right, when it does descend and come to him. But this is grounded on a particular Reason; that is, because he had more than a mere Right, for he had the Possession of the Land, and therefore might make a legal Conveyance thereof; and the Law *Quæri.* favours Extinguishment of Rights, so that the Right and Possession may go together: Besides, a Feoffment is of an high Consideration in the Law, because executed by Livery, and causes a Transmutation of the Possession, and therefore is carried even to the Extinguishment of former Rights, in Favour of him who has the Conveyance; for by this Feoffment he did not convey a bare Right only, but the Estate also. So that the Feoffee might by Law make a Feoffment thereof, and by Implication, upon such Feoffment and Livery, all future Rights of him that made it are extinguished; for being in Possession, and conveying the Land it self, he conveys all Rights attending thereon, whether present or future; but yet this does not bar his *Note.* Heir at Law, for he may enter notwithstanding; and as to him the Right is not absolutely extinguish'd; tho' at the same Time this Feoffment is good against him that made it.

This general Rule again admits of another Exception; and that is in the Case of a Release with Warranty, where a Man makes a Feoffment with Warranty, that Warranty will bar a future Right, and that will go to the Heir and

and bar him too; but then that is grounded on a particular Reason, wherefore the Warranty bars, because to avoid Circuity of Action; for if the Heir of him that made the Warranty should recover the Land against his Father's Grantee, this Land, when it descended to him, would be Affets in his Hands, and would be liable to the Warranty; so that it works an Extinguishment of this future Right, by Way of Rebutter. But there is no Case in all the Law, that by any legal Conveyance at Common Law, a Man could convey Lands that he had no Right to, nor in Possession thereof at the Time of such Conveyance. In the first Case he had not the Possession, nor any present Right, but if he had, by the Release it would have been extinguished to him that had the Possession; because that the Possession, which the Law favours, should not be disturbed; but future Rights it was never extended to.

Yet the Law has allowed Releases of Rights, which are in the Nature only of Possibilities, that a Man may release to him that has the Possession a possible Right only, tho' it does not allow him to transfer or convey away to a Stranger such a Right; and that is the Reason the Law allows a Man to release an executory Interest in a Term which he has devised to him, and is in the Nature only of a Possibility; but yet he cannot assign it away to a third Person, tho' he may, as I said before, release this Right to the Possessor of the Land by Way of Extinguishment. So that the Rule of Construction of Conveyances at Common Law, will be the true Rule to expound this Statute.

But to narrow this Question a little more; I do agree, that Devises of Land have not been subject to the strict Rules of Conveyances at Common Law, because the Law favours Dispositions by Will to make them agreeable to the Intent of the Testator; whereas Conveyances at Common Law stand on a different Foot.

In the Case of Wills the Testator is *inops Consilii*, and has no Opportunity of observing the Formalities of Law, and therefore Wills are not in all Cases subject to the Rules of Conveyances at Common Law; but then all this

is grounded on this Supposition, that the Testator has wherewithal to make Disposition of.

Let us then consider, how the Law makes a Construction in what comes nearest to Wills; and that is Conveyances of Land to Uses, which the Statute of 27 H. 8. has executed into Possession. The Rules of Construction in these Cases are the most proper Rules to be adapted to Wills. Conveyances to Uses.

Wills have been all along construed according to the Intent, and so has the Law all along supported those Conveyances to Uses, on the supposed Intention of the Party, tho' there should be some Defects in them. The Law has done the same as to Wills; they are likewise supported according to the Intention of the Party, to supply such little Defects as may be in them.

Now by Conveyances to Uses at Common Law; could any Man convey an Use in Land which he had not at the Time of making the Conveyance? No, surely he could not; and that is plainly proved by a Case cited at the Bar, *viz. Telverton and Telverton*, 3 Cro. 401. There the Father covenanted to stand seised of Lands which he afterwards should purchase, to the Use of himself for Life, and after to his youngest Son and his Heirs; and afterwards he purchas'd Lands and died: And the Question was, whether the eldest or the youngest Son should take? and it was there resolved, that no Use could arise to the youngest Son, being of Land he had not at the Time of the Conveyance; and that is grounded on very great Reason, because he cannot raise an Use of Land which is not his own; for if a Man that has no Right to the Land, can raise an Use of that Land, then two at the same Time might raise Uses; for it cannot be denied, but he that is Owner of the Land, may dispose of it, or raise what Use he pleases, and that he is the proper Person on a Sale to declare the Use. It is impossible the same Land should be to the Purchaser for Life, with Remainder to the youngest Son and his Heirs, and at the same Time should be to him and his Heirs. These would be to make contradictory

dictory Uses in Being at one and the same Time, as being declared by different Persons.

It is allowable indeed in the Law, for a Man to covenant that he will purchase Lands by such a Time, and levy a Fine thereof, and that the same shall be and enure to such and such Uses, but then the Reason of that is, that when the Land is purchas'd and Fine levied, the Use arises on the Fine; and not on the Deed made by him before he was Owner of the Land; and tho' he could not declare the Use before he had the Land, yet the Fine by Relation raises the Use, and the Deed made before is only an Evidence of his Intention, that it should be to such Uses; if no Uses were declared at the Time of levying the Fine; for at that Time he might declare other Uses; but no other Uses being declared, that Deed serves for an Evidence of the Intention of the Party, no other Intention appearing.

To apply that to this Case; here is a Conveyance by Will made, whereby Land is disposed of, which he had not at the Time of making the Will, and is a Disposition to take Effect *in futuro*; and so was that Case, a Grant and Disposition of Land, when he should purchase it, so this Will cannot be a present Disposition of what he had not, but a Declaration how the Land should go at his Death. But it is very plain that the Making of the Will is the Foundation, and is an inchoate Disposition, so that if the Devisor has not the Land at that Time, it will not pass.

There is yet a further Reason why Wills should receive such a Construction as Conveyances by Way of Use, and why they should imitate such Conveyances; because it appears, that that Act of Parliament of Wills was made to supply the Powers of declaring Uses by Mens Last Wills and Testaments, which they had before the Stat. of 27 H. 8. of Uses. For tho' the Subject before the Act 32 H. 8. had not any Power to dispose of their Lands by their Last Will, yet they had what was tantamount, which was a Power to declare Uses by their Last Will; for before the 27 H. 8. of Uses, which executes the Possession to the Use, all the Lands were subject to *usufructus* *que* Use, and he had a Power to declare the Uses of the Land, the Trustees

had

had the Possession, as he thought fit, either by Deed or Will, so that in Effect he had a Power of devising by Will, by declaring the Uses that the Trustees should stand to, after his Death. But when the Statute of 27 H. 8. came and executed the Possession to the Use, then the *Cestui que Use* had no longer any such Power of declaring the Use as before, because then the Use and the Lands were the same Thing, being united together; and that is the Reason why this Statute of Wills gave Men a Power to dispose of their Lands by Will, which was given in Lieu of that Power which *Cestuy que Use* had before of declaring the Uses of the Land, as he thought fit; and therefore there is a great deal of Reason a Will should receive the same Construction.

But it is objected, that a Will is not to be construed according to Conveyances by Deed at Common Law, because a Will is no present and immediate Disposition of Land, and is not like a Deed that takes Effect immediately by Delivery; for in such Cases a Man must have the Land at that Time else it is against the Nature of a Grant or immediate Gift, to dispose of what he has not, but that a Will is another Thing. It is only a future Disposition in case the Man dies without any other Alteration; and is ambulatory, and not completed or consummated till his Death; and therefore Reason good he should be able to dispose of the Lands he should have or purchase at any Time before his Death, because it does not take Effect till his Death.

Objection.

Now in Answer to this Objection, I shall distinguish to what Purposes a Will does not take Effect till Death, and to what Purposes it does take Effect from the Time of making and before the Party's Death. 'Tis true, to many Purposes a Will takes no Effect till the Testator's Death, but on the other Hand, to many other Purposes it takes Effect from the Time of making only. The Law does require many Qualifications necessary to be in the Testator at the Time of making the Will, which should they come at any Time after, tho' before his Death, would make the Will void, and the Lands would not pass thereby. Indeed

Answer.

as

as to the vesting an Interest in the Devisee, the Law has regard to the Death of the Party only, for no Interest can vest in the Devisee as long as the Testator lives; and a Will, in it's own Nature, is not to pass any Thing but on Supposition of the Testator's Death; for it is a Provision and Direction how his Lands and Estate should go when he can keep them no longer. Where a Man devises Lands to another, and the Devisee happens to die before the Devisor, this is a void Devise, and the Lands do not pass; for if they should, the Heir of the Devisee must take contrary to the Intent of the Devisor; for by the Will he was intended to take by Descent; and if Lands pass, he must now take by Purchase. In this Regard also a Man's Wife may take by his Will, tho' she cannot take by any Conveyance at Common Law; for the Will not taking Effect, in Point of transference of an Interest, after the Husband's Death, she is in Nature of a Stranger, and so the Land will well pass to her; and in many other Cases of this Nature, which I could mention if necessary, a Will takes no Effect till the Death of the Testator.

But when you consider another Thing necessary to make a Will good, as a necessary Qualification in the Testator, which is the Power and Capacity of Disposing by his Will; there I take it the Law regards the Time of making the Will; and as to the Power of disposing Lands by Will, that consists of several Particulars. As,

1. To enable the Testator to dispose by Will, or any other Way, the Law requires he should have an Interest in the Thing he is to dispose of; and if he has nothing in the Thing to be disposed of, how can he be said in any Sense to have a Power of disposing it.

2. The Testator must not only have an Interest in the Thing devised, at the Time of making the Will, but must have a disposing Mind too; he must have Ability and Capacity, in Point of Discretion and Understanding, as a rational Man, and these two Qualifications are necessary to make up the Power of disposing; and this Power must be perfect and compleat, at the Time of making the Will; and none of those Qualifications coming after, tho' before the

the Death of the Testator, will make this Power good, and the Will effectual in the Law; these are personal Qualifications, and must be had at the Time of disposing, and will be too late to come after.

Now as to the Qualification in Point of Discretion; if a Man be *Non Compos*, and not in his right Senses at the Time of making his Will, tho' he afterwards, never so long before his Death, becomes a Man of Understanding, and sound Judgment and Memory, yet the Will is a void Will, and will by no Means be made good; because he wanted the disposing Power at the Time of Disposition, which was the Time of making his Will. So the Law is the same of a Feme Covert; if a married Woman makes a Will, tho' she becomes a Widow and unmarried before her Death, yet such is a void Devise without Republication; for the Law here regards the Time of making only. So it is in the Case of an Infant; if he makes a Will, tho' he be of Age, nay tho' never so old when he dies, yet it is a void Devise; because he had not Discretion, nor a disposing Mind at the Time of making; for it is that which the Law regards in these Cases, and not the Time of the Death of the Testator.

Then as to the other Part or necessary Qualification, which goes to the Power of Disposing, which is Ownership of the Land; the Law requires that to be compleat at the Time of making the Will. Consider as to this Point, the Law is very strict that the Testator should have a disposing Power at the Time of making the Will; for it is so far from allowing a subsequent Power, by Acquisition after to make the Will good, that the Law requires a Continuance of the same Interest, that the Devisor had at the Time of making the Will, to remain unaltered, even to the Time of his Death; for that any, even the least Alteration of this Interest, is an actual Revocation of such Will: As where there is a Tenant in Tail, and he makes a Will and devises these Lands away; now tho' he has an Inheritance in these Lands, and they are his own, and he could dispose of the absolute Inheritance and Fee-simple by Fine and Recovery, yet if after the Making such

S f

Will,

Will, at any Time before his Death, he suffer a Recovery to him and his Heirs, and alters the Estate from a Tail to a Fee, this is so far from making his Will good, that it is an actual Revocation of the Will, yet he was Owner of the Land when he made the Will, and is no more now, but only the Estate is altered, and he has now another Sort of Fee. Nay the Law is still stricter; as where there is Tenant in Fee-simple, and he devises his Lands away to another, and after that, and sometime before his Death, makes a Feoffment of these Lands to another, to the Use of himself and his Heirs; tho' this to some Purposes is no Alteration, for he is absolute Owner of the Estate as before, yet this does not make the Will good, but is a Revocation thereof; and so it was adjudged in the Case of my Lord *Lincoln*, tho' so small an Alteration was in the Estate.

Now this shews the Law requires the Testator should have a compleat Power of Disposing at the Time of making the Will; and that that Power and Interest he had at that Time should continue, and be the very same at the Time of his Death.

Now if the Law will not allow any the least Alteration of Estate from that which he had at the Time of making the Will, but will rather work a Revocation and Destruction of that Will; I do not see how the Testator's purchasing after can work here to make the Will good, when he had nothing at all, no Interest in or to the Land at the Time of making the Will; This is a far greater Alteration than from a Tail to a Fee, or from one Sort of Fee to another. For this is an Acquisition of a new Right and a new Power; it is totally a new Interest purchased after making the Will, when he had neither Right or Interest at the Time of the Will, which can never have Effect to make this Will good. So that as to the Power of disposing Lands by Will, the Law requires the Devisor to have this Power compleat and entire, both in regard of the Estate and Interest to be disposed of, and in regard of the Testator's Understanding and Discretion, which are necessary to be had at the Time of making

king the Will; and these Things tho' they happen afterwards, tho' never so long before his Death, yet they come too late to make the Will good. So that if this Act of Wills were now *de novo* to be construed, it would receive this Construction, That a Man's having Lands, so as to give him a Power to devise them by Will, by Virtue of the said Act, must be meant, having those Lands at the Time of making his Will, and not at the Time of his Death only.

But then in the second Place, this being a Law made a long Time ago, and it has received many uniform Determinations agreeable to this Construction: This ought to be of great Consideration always, that the Law may be certain, when there have been solemn Determinations after long Debate, and an Acquiescence under them; and when accepted and received as a Rule of Property, tho' some should not be satisfied in their private Judgments, were the Matter to be newly resolved, it is but reasonable we should acquiesce and determine the same Way, to prevent greater Mischiefs which might arise from the Incertainty of the Law. Now there have been several solemn Resolutions, and Acquiescence under them, that a Man cannot dispose of Lands before he has them.

As to the Case of *Brett and Ridden*, I do not think that to be a Determination of this Point. That Case was no more than this: A Man had Lands in a certain Parish or Place, and made his Will, and gave away all his Lands in that Parish, and afterwards sometime before his Death, purchases other Lands in the same Parish; and the Question was, whether these new purchased Lands should pass or not? and held they would not. But that Judgment was not grounded on this Question, Whether the Testator could devise Lands he had not? But whether the Words of the Will, in Point of Intention, could extend further than to those Lands he had at the Time of making the Will, there being in that Will no future Words, nor declared Intention, of passing any Lands he should purchase *in futuro*? That Judgment went rather on a Supposition that the Intention of the Testator was satisfied, in passing those Lands the Testator had at the Time of making the Will;
for

for there being no future Words in the Will, it might be the Intention of the Testator that the Devisee should have the Lands he had at the Time of making his Will, and his Heir have the new purchased Lands by Discent. But there are some Cases in Point with this: As *Butler* and *Baker's Case* in the 3d Part of my Lord *Coke's Reports*, and *Leonard Loveis's Case* in the 10th Report of my Lord *Coke*; They go expressly on the Word *Having* at the Time of making the Will; and this has been all along taken as the Rule; and all People ought to acquiesce therein, being so often and so solemnly in this Manner determined.

Secondly.

And now I come to the second Matter on which this Case depends, and that is the Custom.

Custom of

Whether, tho' it should be allowed, that by a Will a Man cannot dispose of Lands which he had not at the Time of making the Will, and which he purchas'd afterwards, yet whether such Devise may not be by such Custom as is here found? And whether such Custom will not make this Devise good? And I am of Opinion it will not.

Gavelkind.

The Custom found is no more than that Gavelkind Land may be devised by Will in Writing: But there is no such Custom found, as that a Man may devise Gavelkind Land that he had not, but only that Gavelkind is devisable.

If it be a reasonable Construction of the Act of Wills, that to enable a Man to devise, he should have the Land at the Time of making his Will, why should not this Custom be so expounded, since the Custom is only to enable a Man to devise Land; if it be a reasonable Construction as to common Socage Lands, why not as to Gavelkind Lands, since there is no more particular in one Case than the other. And the rather because all Customs, which are against the Common Law of *England*, ought to be taken strictly, nay very strictly, even stricter than any Act of Parliament that alters the Common Law.

Rule.

It is a general Rule, that Customs are not to be enlarged beyond the Usage; because it is the Usage and Practice that makes the Law in such Cases, and not the Reason

son of the Thing, for it cannot be said that a Custom is founded on Reason, tho' an unreasonable Custom is void; for no Reason, even the highest whatsoever, would make a Custom or Law; so it is no particular Reason that makes any Custom Law, but the Usage and Practice it self, without Regard had to any Reason of such Usage; and therefore you cannot enlarge such Custom by any Parity of Reason, since Reason has no Part in the making of such Custom.

Now in Construction of Acts of Parliament it is otherwise, and there is a greater Latitude allowed in them; and the Reason that induced the Law-makers to make such Acts, to take away the Common Law, may be and is usually urged in making Construction of them. Therefore in doubtful Cases we may enlarge the Construction of Acts of Parliament, according to the Reason and Sense of the Law-makers, expressed in other Parts of the Act, or guess, by considering the Frame and Design of the whole. But it is not so in the Case of a Custom, because not founded on any particular Reason; for the Reason of the Common Law is against it; but the Law allows Usage in particular Places to supersede the Common Law, and is the local Law, which is never to be extended further than the Usage and Practice, which is the only Thing that makes it Law.

Now there is nothing here found of a Usage to devise Lands which a Man had not, or which he should afterwards purchase; and then we must enlarge this Custom to devise Lands which the Devisor had not at the Time of making the Will, which is beyond a reasonable Construction; for tho' it be lawful and customary to devise Lands a Man has, yet it does not follow, that by the same Reason a Man may devise the Lands he has not, for it is on different Considerations; because the Common Law enables a Man to dispose of what he has; but there is not the same Parity of Reason, that Custom should enable a Man to dispose of what he had not; nor did it ever give a Man Leave to dispose of what he had not, it being a Thing against Reason, that any Man should have a Right to dis-

pose, when he had not the Thing to be disposed of, therefore it ought not to be carried in Parity of Reason further in a Custom, which ought to be construed more strictly than it would be at Common Law.

But then it is further objected, that this Custom is a general Power of disposing, as far as a Man may, his Goods and Chattels at Common Law, which he may devise in Manner as is contended the Lands ought to go in this Case. For it is said, say they; in *Fitzherb. Nat. Brev.* That this Custom of Gavelkind Land is to devise Lands *tanquam Bona & Catalla*. But surely these Words do not prove that Gavelkind Land by such Custom may be disposed of to all Purposes, as Goods and Chattels: There is most certainly a great deal of Difference between a Devise of Lands and a Devise of Goods and Chattels; Goods and Chattels were always taken to be Testamentary Things. If a Man make a Will, the Law gives all his Goods and Chattels and personal Estate to his Executor; by his being named Executor, he has a Right to all the personal Estate; and if a Man makes no Will, the Ordinary did dispose of the Intestate's Estate, 'till the Statutes for granting Administration were made; so that as to the personal Estate the Law did appoint no Person who should take in Succession as to that, unless the Testator did dispose thereof; but as to Lands, the Law has appointed the Heir to represent the Ancestor, and to succeed him in his Inheritance; therefore Lands ought not to go from the Heir to whom the Law has given them, otherwise than as expressly devised from him to some other.

And tho' the Testator does dispose of his Goods and Chattels by his Will to Legatees, yet they all pass to the Executor, and he has them in the Nature of a Trustee; and he alone has a Title in Law to them, and nothing passes to the Legatee; nor can any Legatee take any Thing devised to him until the Executor do assent; so that this in Effect amounts to no more than a Direction to the Executor how he shall dispose of his Testamentary Estate, when Debts and Funeral Expences are paid.

Testaments of Goods and Chattels are by the Civil Law, and of Ecclesiastical Conusance, and subject to the Rules of the Spiritual Court, and to be governed by their Law; but as to Lands nothing enables a Man to take but the Common Law, and the Heir is in by Discent, as being the Person appointed by the Common Law to succeed and represent his Ancestor; and if Lands are devised away by a Will from the Heir, they pass immediately by the Will to the Devisee. So that there is a mighty Difference between a Disposition of Lands and of Goods and Chattels.

The Cases cited at the Bar to maintain this Devise were *Brook 15. tit. Devise. Fitzherb. Abr. 17. and Statham's Abr. 11. the same Title*; and these were press'd as Authorities in Point.

All these Cases are founded on the Year-Book of the 39 H. 6. I have look'd into that Book, but that does not by any Means warrant any such Opinion, for the principal Case was no more than this: A Man devis'd Land, and was after that disseis'd, and then died; the Question there was, whether it was a good Will, because he did not die seised? And their Opinion seems to be, it was not a good Will, because he did not die seis'd. And then the Book says, But suppose a Man should after making his Will purchase Land; and there is no Resolution as to that, but only a *Quere*. So that these Books are only Collections and Inferences upon the 39 H. 6. which warrants no such Thing, but rather the contrary; especially if it be considered this Case must be on a Custom to devise, because long before the Statute of Wills.

And therefore for these Reasons I think the Plaintiff ought to have his Judgment.

Mayor

Mayor of London verf. Mackreith.

In what Cafe
a Man may
be both Judge
and Party.

(5.) **E**RROR out of the Common Pleas; the Cafe was this: The Mayor of *London* brought Action on the Cafe on a By-Law; in the Sheriff's Court in *London*, and had Judgment; the Defendant brings a Writ of Error in the Hustings, according to the Custom of *London*, and was bound in a Bond to the Mayor to prosecute it with Effect; upon which Bond the Mayor brings Debt in *C. B.* and at last it comes by Writ of Error into *B. R.* where the only Question was, whether the Defendant was obliged to prosecute the Writ of Error in the Hustings, the Mayor being Judge of that Court, and so make him both Judge and Party.

This Cafe was 'twice argued the last Term; and now the Court gave their Opinion.

Holt Ch. J. said, The Writ of Error would not lie before the Mayor himself, because he was Party, and so the Bond void.

Powell contra. He agreed, that regularly a Man cannot be Judge and Party; but in Cafes of Necessity he may: As if a real Action be brought against all the Judges of *C. B.* But this Cafe differs from that, for the Hustings may be held before six Aldermen, without the Mayor, and then it shall be intended that the Mayor was absent, because it does not appear of Record; if the Plaintiff in his Replication had replied, that the Mayor gave the Judgment, I should have been of another Opinion; and it does not appear that the Mayor is a necessary Part of the Court.

Powis and *Gould* were of the same Opinion, that the Writ of Error was well brought, and so the Bond good; and the Judgment given thereon in *C. B.* affirmed.

Queen vers. Apfley.

(6.) **T**WAS moved to quash an Order of Sessions, for removing the Keeper of the House of Correction; it being to discharge him for divers and sundry Crimes, not specifying what Crimes in particular; and 'twas said, That Place is not at the Will of the Justices, neither by the Common Law, nor by the Statute.

Sessions cannot displace without Cause.

Curia. The Justices have Power to turn him out for Misbehaviour, but not arbitrarily; they ought to have specified the Cause in their Order; and 'twas therefore quashed.

Anonymus.

(7.) **N**OTE; In this Term, upon the Motion of Mr. King, two Indictments were quashed; because in the Caption 'twas said, *Per Sacramentu' duodecim proboru' & legaliu' hominum pro Burgo predict'*, instead of *Burgi predict'*; so that it did not appear they were of the Burrough.

Indictment. Caption Pro Burgo, &c. quashed.

U u

Easter

Easter Term, 1708.

7 *Annæ Reginae in B. R.*

Queen vers. Wrightson.

Indictment
for Words
spoken of a
Justice of
Peace.

*Vide post Queen
v. Shaftes.*

(1.) **T**HE Defendant was indicted for saying of Sir Rowland Winn, who was a Justice of Peace, these Words, (*Sir Rowland Winn is a Fool, an Ass and a Coxcomb, for making such a Warrant, and understands no more how to make a Warrant than a Stick-head;*) and the Defendant being found guilty on the Trial, moved in Arrest of Judgment.

Mr. Salkeld for the Defendant argued, That these Words are not indictable, for that they only concern the Person of the Magistrate, and not the Government: Indeed if one reflects on a Justice of the Peace, either for his Office or his Honesty, 'tis a Question whether an Indictment lies; but this censures only this particular Act. Besides it does not appear what the Warrant was.

Mr. Eyre for the Queen argued, That the Indictment was maintainable; for tho' this does not reflect immediately on the Government, yet the Government is obliged to maintain the Instruments of its Authority: Besides the Words censure him in the Execution of his Office, viz. as a Magistrate. *Hutton 131. Cro. Car. 503. 3 Mod. 139.* This is not like reflecting on an Officer in a Corporation; for one is by Commission immediately from the Crown, the other by Election; the one reflects on the Publick Government, the other on the Corporation only.

This being argued several Times, the Court gave their Resolution this Term, that the Indictment did not lie.

Holt Ch. J. said, he knew no Case like this, but the *Queen* and *Darby*. Indeed Words spoken in Disparagement of a Justice's Parts is a Breach of Good Behaviour, but not indictable: Besides the Indictment does not set forth, that this was a legal Warrant; it ought to appear to the Court what Sort of a Warrant it was; for if it was a foolish Warrant, or of a Matter whereof he had no Cognisance, it was lawful to say so. The Words perhaps may be true, and Justices of Peace are not beyond Censure.

Powell the same; and said, If the Words were not indictable, they were much less actionable; and *Powis* and *Gould* agreed. And in this Case were cited by Holt Ch. J. 3 Keb. 492. 2 Roll Abr. 78. 4 Inst. 181. And the Case of *Soley* for abusing the Mayor of *Salisbury*.

Queen vers. *Busheir*.

(2.) AN Indictment on 1 R. 3. c. 3. whereby 'tis enacted that, If any one out of the King's Obeisance, ex-
excise any Trade here, they shall forfeit their Goods and Chattels; and in the Indictment it was, *non natus infra Regnum*; which may be, and yet be within the Queen's Obeisance; and therefore it was quashed.

Indictment on
1 R. 3. c. 3.

Turton vers. *Prior*. [Holt absent.]

(3.) AN Action brought against an Attorney of C. B. who was in Custody of the Marshal of the King's Bench, at the Suit of another; and in this Action they declare against him *in Custodia Marefcalli*.

Attornies of
C. B. their
Privilege.
2 Roll Abr.
274. cited by
Mr. Eyre,
and 275. by
Mr. Raymond.

The Defendant pleads his Privilege as an Attorney of C. B. That he cannot be arrested in B. R.

The Counsel for the Plaintiff argued, that they might declare against the Defendant so, because he was actually *in Custodia Mar'*. But the Court directed that the Defendant

dant should be removed by *Habeas Corpus* to the Common Pleas; and that an Action should be brought against him there.

Starr vers. Rookby.

Custom for
Occupatores to
Repair. 2.

(4.) **A**N Action for not repairing of Fences; and the Plaintiff declares *quod omnes Tenentes & Occupatores* used to repair them; which the Counsel for the Defendant said could not be good, because they could not lay the Custom for *Occupatores*, and cited 4 *Mod. Stroud* and *Bitt's Case*; *Yelverton* 75. *Cro. Eliz.* 45.

The Counsel on the other Side said, that *Tenentes* may prescribe; and cited *Cro. Jac.* 665. *Book of Entries* 140. and said that this Way of Pleading is used more now than formerly, and this is after Judgment by *Nihil dicit*. But the Court seemed to incline that the Prescription was not sufficiently laid.

Queen vers. Lord Griffin. [Holt absent.

No Counsel
allowed after
Outlawry for
Treason.

(5.) **T**HE Lord Griffin being brought by *Habeas Corpus* to the Queen's Bench, upon his Outlawry, desired Counsel to take Exceptions to the said Outlawry.

But *Powell* (*Holt C. J.* being absent,) denied it, and said, that tho' the Statute gives Counsel in High Treason, at the Trial, yet none is to be allowed after an Outlawry; except the Prisoner shew some particular Error on which the Court may assign him Counsel; but the Court is his Counsel, and will do him Justice, and on that Execution was ordered to be awarded by Rule of Court; the Solicitor General then moved that some Time might be pronounced, which he said the Lord Ch. J. *Holt* told him was most proper. But the Court said the Practice had been otherwise; and directed that a Rule should be awarded *quod fiat Executio* generally.

Billingf-

Billingsworth vers. *Spearman*, &c.

Holt Ch. J.
Powell, Powell
and Gould Jus-
tices in Court.
Debt against
Husbands and
Wives Af-
fignees of a
Term; &c.

(6.) AN ACTION of Debt was brought against the De-
fendants, whose Wives were Assignees of the
Term; it was brought only against the Husbands, to
which Declaration there was a Demurrer.

Sir Edward Northey *pro Def* said, The Wives should
have been joined in this Action; and that the Authori-
ties were express, That if a Lease be made to Baron and
Feme, during the Coverture, she must be joined; which
is a stronger Case than the present; 2 H. 4. 19. for here
the Right is only in the Wife; and the Husband has no
Interest but in her Right. In Waste, if the Wife be Te-
nant for Years or Life, the Action must be brought a-
gainst both, tho' the Husband only do the Waste. *Cro. Eliz.*
356. And he shall not be chargeable in this Case, by
Reason of taking the Profits. Indeed when the Title is
not known of the Landlord, *prima facie* taking the Profits
is good Evidence; but not if it be shewn that there is an
Under-tenant by Lease, &c.

Whitacre pro Quer cited 26 Ed. 3. 64, 562. 1 Roll Abr.
10. H. 6. 11. F. N. B. 121. *Keilw.* 125. a. Ray. 6. 1 Lev.
25, 26.

Holt Ch. J. If the Husband be seised of Land in Right
of his Wife, which is charged with a Rent-charge, the Ac-
tion for the Rent Arrear shall be brought against the Hus-
band only; but that differs much from this Case, for that
is by Reason of taking the Profits, for the Rent is the
Profits of the Land. Then he found a fatal Fault, *viz.*
That the Assignee of the Term had made an Executor,
who devised the Tenements to the Wives of the Defen-
dants, which could not be.

Powell. This Action is brought against them as Assignees,
in respect of the Interest in the Term; and differs widely
from the Case of a Rent-charge; for that is only in
Respect of taking the Profits.

Holt Ch. J. The very nature of the Undertaking, that each Party shall per-
form is a mutual Undertaking, that each Party shall per-
form

X x

Judgment

Judgment was given on the last Fault of the Devise by Executors; upon the Opening of which Point, *Holt* said, he thought an Executor could not wave a Term: For if he accepted Part of the Executorship, he must accept the whole, as he stands empower'd by the Will. *Q. Powell.* If the Rent be more than the Term, he may shew it specially, and pray that he may be charged no otherwise than in the *Devise.* *Sed Holt contra.*

Busbell vers. Haynes.

Debt on Bail-Bond not saying 'twas assigned.

(7.) **D**EBT upon a Bail-Bond, as Assignee of the Sheriff of *Suffex*, according to the late Act of Parliament; and declared generally, without shewing the Matter specially, that it was a Sheriff's Bond, which by the late Act is assignable; to which there was a Demurrer.

Discontinuance on paying Costs.

Es per Cur'. It should have been shewn that it was a Bond assignable; and when Mr. *Salkeld* found the Opinion of the Court against him, he prayed to *discontinue*, which was granted, on Payment of Costs.

Lupart vers. Welson.

Submission to an Award, imports a Covenant to perform.

(8.) **A**N Action of Covenant was brought on an Agreement to refer all Matters in Difference to an Arbitration; a Difference arose about a certain Demand, and the Arbitrators awarded 500*l.* to be paid, and general Releases to be given. 'Twas argued, That tho' no express Words were in the Covenant, that the Defendant should perform, yet it should be good by Implication. *Dyer* 216, 217. 8 Co. 82. 1 Roll Abr. 7. pl. 13. *Allen* 69, 70. 1 *Leu.* 113. 1 *Sid.* 160. 1 *Ventr.* 69. *Lane.* 373. For wherever there is an equitable Interest, it is sufficient to submit to an Award. *T. Jones* 158.

Note.

Holt Ch. J. The very referring a Thing to Arbitration is a mutual Undertaking, that each Party shall perform

form his Part of the Award; for otherwise it cannot be said to be referred. Cannot one who is a Stranger covenant, that a third Person shall perform the Award between A. and B.? This indeed cannot bind the Man to a Performance, but it will be a Breach of the other's Bond. If a Man assigns a Bond, and afterwards brings an Action thereon in his own Name, this is a Breach of the Agreement: For the very Assignment imports a Covenant, that the Assignee shall bring the Action, in the Assignor's Name, and recover, and have the Money to his own Use. Antiently, if an Award was made to pay a Sum, this might have been pleaded in Bar, tho' without Satisfaction; because the Law gave an Action of Debt for the Money upon the Award, and so a Remedy. And tho' that Law be now altered, yet now, when two Persons submit to an Award, this amounts to *mutual Promises*.

Inter Oakham and Whittlesea Parishes.

(9.) **A**N Order was made by two Justices to remove a poor Man, *Except he finds Security to be allowed by them, (i. e. the two Justices.)* And Mr. Page excepted thereto for that Reason; and also, that it did not say, he was likely to become chargeable, or, that he came there to settle, not having 10*l.* *per Annum.* *Holt Ch. J.* they cannot make a conditional Order; (or, that in case he does not find Security, then to remove him.) For an Order of Removal is an Adjudication, and ought to be absolute. And they have nothing to do with the Security, for that belongs to the Parish, and is not to be allowed, or disallowed, at the Justices Discretion.

Then Mr. *Raymond* moved to set aside the *Certiorari*, by which the Order was removed, because in the Order the Town was spell'd *Oakham*, but in the *Certiorari* *Okebam*.

Sed non allocatur; and the *Certiorari* was confirm'd.

† *Queen*

Queen vers. Jay.

Certiorari
quashed.

(10.) **I**N the Beginning of this Term, a Writ of *Certiorari* was quashed; because 'twas directed *Justificariis ad Pacem assignat*, omitting the Words *Ad conservandum*.

Queen vers. Atkins.

Order of Bastardy quashed for Incertainty.

(11.) **A**N Order of two Justices was on the Father of a Bastard-Child, that he should pay 1s. 6d. *per Week* from the Time of the Birth of the Child till it be ten Years old, and then to pay 5*l.* for the putting it out Apprentice; 'Twas objected, that the Order was not according to the Statute; for 'tis uncertain whether it will be chargeable so long as till ten Years old. It ought to have been, To pay so much, &c. so long as the Child is chargeable to the Parish. Which the Court agreed; and therefore quashed the Order. See *The Queen v. Collins*

Queen vers. Digg.

Writs of Excom' Cap' quashed.

Note the Difference.

(12.) **M**R. Page moved to quash a Writ *De Excommunicatione Capiendo*. His first Exception was to the *Significavit* upon the *Excom' Cap'*. That it did not therein appear, that the Person was commorant in the Diocese. *Moor* 466, 467. 2^{dly}, That it does not appear there were forty Days between the *Excom'* and the *Significavit*; that so the Party may reconcile himself to the Church before the *Excom' Capiend'* issues. *Cro. Car.* 82. The *Significavit* is recited in the *Excom' Capiendo*. This Writ is returnable here, and after it is so returned, this Court may well quash it, if it be a bad Writ; but before it is returned here, the Chancery upon Motion, if it be a bad Writ, is to grant a *Supersedeas* to it. As to which the Court ordered Precedents to be searched. A third Exception was, That it did not appear, that the Excommunication

tion was since the last General Pardon. Which Exception the Court seemed to allow.

Queen vers. Haynes.

(13.) **M**R. Pengelly also moved to quash an *Excom' Cap'*; Simile. For that it did not appear in the Writ, that the Crime alledged was of Ecclesiastical Conusance. *Raymond cont.* Tho' that Matter does not appear in the Writ, yet it appears throughout the Proceedings, that this was a Cause before the Delegates, and therefore it shall be intended of Ecclesiastical Conusance: But the Court held, it ought to have so appeared in the Writ; and therefore held the Writ naught, and quashed it. See the Stat. 5 *Elix. c.* and *Quere* The Bishop of *St. David's* Case, and the Case *infra*.

Queen vers. Blower.

(14.) **A**LSO (in this Term) Mr. King moved to quash Simile of Sub-
traction. another Writ of *Excom' Cap'*; For that it only recited, to be for a Matter of Tithes or other Things (Matters) of Ecclesiastical Jurisdiction, and did not set forth what Things, (or Matters,) particularly. And the Writ was quashed for the said *Incertainity*; and for that it being laid disjunctively, or other Things, shew'd that it might be for something else of Ecclesiastical Conusance besides Tithes; and what that is does not appear.

Queen vers. Cope.

(15.) **A** Writ of Error to reverse an Outlawry: The Outlawry re-
versed. Error for which it was reversed was, because *in secundo exacto* it does not appear where the County-Court was held.

Queen vers. Corp. of Corn. [Holt absent.]

Return to a Mandamus. (16.) **N**ON *fuit Electus* is a good Return to a Mandamus: But to set forth that a Burgess is *prefectus & juratus*, which is no more than that he is preferr'd and sworn to that Office, is not good.

Queen vers. Dy. [Holt absent.]

No Indictment lies on the Statute of Usury. (17.) **N**O Indictment will lie on the Statute of Usury: For the Method the Act prescribes must be followed; therefore the Indictment quashed.

Jenkins vers. Plome.

Costs by Executors. (18.) **W**HEN an Executor brings an Action as Executor, where he need not name himself Executor, and it goes against him, he must pay Costs, as 'twas adjudged in the Case of *Elways and Mocato*. See *Salk. 314. Fares. 48.*

Trin.

Trin. Term, 1708.

7 *Annæ* Reginae in B.R.

Wright vers. *Sharpe*.

(1.) **A**N Action on the Case for a false Return to a *Mandamus*; Verdict, and Judgment for the Plaintiff; a Motion was made for a peremptory *Mandamus*, and Mr. Page opposed the Motion; because a Bill of Exceptions was tender'd for refusing a Book to be given in Evidence on the Part of the Defendant: But Note; Nothing was mentioned of a Bill of Exceptions at the Trial, nor any Thing done in it till after Verdict.

Powell J. upon the making this Motion, was of Opinion, That whether the Bill was mentioned in Time or not, that it should not stop a peremptory *Mandamus*. If a Motion had been made for a new Trial it would have hindered it; and a new Trial would have been granted for refusing of Evidence; but he said, if a Writ of Error had been brought, it would not stay the peremptory *Mandamus*; and therefore a peremptory Writ was granted, *per Cur*.

And as to the Tendering the Bill of Exceptions, he said, some Minutes of it should have been drawn up at the Trial, and the Counsel on both Sides should see it, and set their Hands to it, to put it out of all Dispute afterwards. That the Statute *W. 2. c. 31.* says, *Scribat Exceptionem*, which must be understood to be at the Trial. But this Point was adjourned to be spoke to by Counsel.

Afterwards at another Day this Term, Mr. Eyre for the Bill cited the *Register* 182. where the Writ to compel the Judge

Holt Ch. J.
Powell, *Powis*
and *Gould*
Justices.
Of peremptory *Mandamuses*, and of Bills of Exceptions.

The Effect of Bills of Exception, to be minuted and signed by Counsel at the Trial.

Judge to set his Seal, mentions no Time but when it should be demanded; and 'tis very propable, if it should be done at the Trial, it would appear in the Writ; he cited *Rast. Ent. 253. F. N. B. 54-6. The Old F. N. B. 21. Letter N.* No Notice taken of the Time of the Prayer of it. *Raym. 404, 405.* And besides he said, the Party was not aggrieved till after Verdict. Also *Page* spoke to the same Effect.

Sir Edward Northey, against the Bill of Exceptions, argued from the Inconveniences that would attend such Practice, if it should be allowed, that after a Trial in a long Vacation they might come and tender a Bill of Exceptions, when the Judge, who tried the Cause, had quite forgot the Thing insisted on; and so no Man that had a Verdict could ever be secure.

Mr. Raymond of the same Side said, that this was a plain Case, by the very Words of the Statute; and that Minutes should be taken of it at the Trial, just like a special Verdict, and demurring to Evidence: As to the Objection made by *Mr. Eyre*, that no Time was mentioned in the Writ in the Register, he said, it pursued the Words in the Statute *W. 2. c. 31.* This Case, if it should be allowed, would be of very ill Consequence, upon this Account: Suppose a Dispute does arise at the Trial, whether such a one shall be allowed to be a Witness for me, and upon Debate, the Court admits him to be Evidence, and after the Trial is over, you will come and tender a Bill of Exceptions; because he was allowed Evidence, I am hereby precluded from other Evidence; whereas if you had mentioned it at the Trial, I might have had Evidence enough without him to have had a Verdict, and so should not have insisted on him. If this Practice be allowed, no Man is safe, tho' he has a Verdict.

Holt C. J. If Evidence be not allowed, and you have Thoughts of tendering a Bill of Exceptions, Minutes must be taken of it at the Trial, and there is no Need that it should be put into Form: 'Tis just like taking Minutes of a special Verdict; or demurring to Evidence, the Party must join in Demurrer; but that is all in Minutes. But

as to Matter of Form, that is done afterwards, and then when 'tis done it has a Retrospect, as if it was done at the Trial; and in this Case the Judge is Judge of the Evidence, and when he has given his Judgment, if you say nothing to it, nor except against it, you submit to his Judgment; and if you come after the Trial is over, it is too late, for his Authority is determined; and as to the Inconveniency of such Practice, he said, Suppose after the Trial is over some Time, the Counsel come and tender a Bill of Exceptions to the Judge, he it may be has forgot the Thing insisted upon at the Trial; the Counsel says he remembers it, and so, if the Judge does not remember it, an Action shall be brought against him, and so the Counsel's Memory shall arraign the Judge: He also said, when 'tis put in Writing at the Trial, it should be left with an Officer of the Court.

Powell J. said, It must be prayed at the Time of the Trial, when the Exception is over-ruled; and the Cause may go on nevertheless, for only the Substance of the Exception is to be taken down at the Trial, without regarding Form. And that *scribat Exceptionem* must be understood to be done at the Trial. Powis and Gould being of the same Opinion with the Chief Justice, and Justice Powell, they refused to sign the Bill; the Cause being tried before them at Westminster, at the Sittings for Middlesex.

Thomson vers. *Pinchell*.

(2.) AN Action by Baron and Feme against the Defendant, for Goods taken out of their Possession; the Wife was Administratrix.

Mr. Raymond moved in Arrest of Judgment, because the Goods having been in their Possession, the Wife should not be joined; and naming her Executrix might have been left out of the Case, and cited a Case 10 W. 3. where the Wife was Executrix, and the Defendant promised the Husband, that if he would forbear he would pay; and the Wife was not joined in that Case.

Baron and Feme.
A Feme Executrix must join with her Husband.

Powell J. In the Case of Baron and Feme, 'tis certain the Law does give the Goods of the Wife to the Husband; but not when she is Administratrix, because she has them *in autre Droit*; and the Husband here cannot bring an Action on the Judgment. Judgment for the Plaintiff.

Queen vers. Collins.

Order of Bastardy quashed. See *Queen* and *Atkins* ante.

(3.) **A**N Order of two Justices made upon *Collins*, the reputed Father of a Bastard-Child; 'tis ordered, he shall pay 20*d.* a Week, and the Woman 4*d.* a Week, for ten Years. *Mr. Raymond* moved to quash it, because it should have been, as long as the Child is likely to become chargeable, and not for a certain Term of Years; and cited *King vers. James*, for it might be, that an Estate might come to the Child in the mean Time, and it hinders the Father from keeping it himself, if he has a Mind to it. (*Ergo*) The Order quashed *per Cur'.*

Queen vers. The Inhabitants of Belzim St. Paul's.

(4.) **M**R. *Raymond* moved to quash an Order of Sessions, which was made to pay a Surgeon's Bill, who had cured a poor Person; and urged, That the Justices have no Power to make such an Order; for it was trying a *Quantum Meruit.*

Hob Ch. J. If a Surgeon cure a sick Person that is poor, he must have his Action against the Overseers of the Parish, and then the Justices make an Order to reimburse the Overseers; but they cannot make such an Order as this; for an Action is the proper Course. Therefore quashed.

Proper Course.

J. Powell

Willet

Willet and Boscomb.

(5.) **C**ovenant brought by an Heir for Rent against the Assignee, but does not set forth in his Declaration, that his Father was seised of any Estate when he made the Demise, only generally *quod cum dimisit, &c.* See *Cro. Car.* 571. 2 *H.* 7. 3. b. *Hutton* 55. were cited.

Where a Title is to be shewn in the Declaration.

The Defendant pleads *Riens in arrear*. It was moved in Arrest of Judgment, that this Narr' was ill, not shewing a Title in his Father.

Eyre for the Plaintiff said, The Defendant's pleading *Riens in arrear* admits that the Lessor had Title, and so is 34 *H.* 6. 486. And if Lessor brings Debt for Rent against the Lessee, 'tis enough to say, *quod demisit*. And *Cro. Car.* 571. the Heir counted, that the Father was seised in Tail, but does not shew when the Estate began, yet 'twas held well. See *Hutt.* 55.

Holt Ch. J. The Case in *Cro.* is well on Issue joined, because it shews the Father was seised; and so it would have been well on Demurrer.

Powell J. The Case in *Hutton* of the Avowry, where it did not appear when the Rent was due, the Verdict help'd it; but not in this Case, when he is Son and Heir, and does not set forth a Title in his Father; I fear 'tis a fatal Fault; and 'twas adjourned.

Note; In *Michaelmas* Term following, this Case was again stirred; and then *Holt* Ch. J. said, Surely this Declaration is naught: The Plea says, the Rent was not in Arrear, but the Declaration and the Verdict say, it was; and so the Question is whether this is not help'd by the Verdict.

Powell. If you entitle your self to the Reversion, you must shew that you are Heir. But in an Avowry perhaps you need not; because in that Case if you had no Title, he is a Trespasser.

Holt Ch. J. If a Lessor brought Debt, that perhaps might have been well, because the Action there had been upon

upon the Demise, and upon the Privy of Contract; but where the Action is brought on the Title, there the Title must be shewn. And here the Jury have found a Title where no Title appears: It will be hard to help this Case by the Verdict.

And 'twas again adjourned.

Holt Ch. J.
absent.

Bourden against Alloway.

Where Case
lies, and
where Tres-
pass. 2.

(6.) **M**R. Eyres moved in Arrest of Judgment, in an Action on the Case, for causing him to be arrested and carried to Prison, without a Cause.

The Exception was, That this ought to have been Trespass and not Case. That a Man cannot change the Nature of the Action by laying it with a *per quod*.

Serj. Wynn *contra*. A Justice of Peace has Power by Warrant to Arrest a Man; and (if he does it wrongfully) this Action lies against him that maliciously causes this to be done.

Mr. Bains took the Difference between an Action of Trespass and on the Case: He said, he had heard from this Court, that there is but little Difference between the one and the other; and that almost all Trespasses might be turned into Actions on the Case, at the Plaintiff's Election: But the true Difference is this; *Trespass* is where there is an immediate Injury; *Case*, where the Injury is collateral.

Mr. Eyres said, It does not appear, that he was arrested by any Authority, and so a plain Trespass. Pengelly said, Where the Damage is immediate, yet the consequential Damage thereon will not alter it from an Action of Trespass to an Action on the Case.

Powel Just. We must keep up the Difference of Actions; and 'twill be hard to maintain this. But if a Man by being imprisoned should have a special Damage, as forfeiting a Recognizance; or that he could not appear at such a Day, *per quod* he was damnified, &c. there it must be Case; and Powis of the same Opinion. Gould said, This is coupled

with

with special Matter, and 'tis laid to be done maliciously. *Ergo* Case lay. *Pengelly*. You may as well say, a Man may maliciously Assault and Wound, and therefore Case lies. *Adjournatur*.

Note; In another Cause this Term, *Powell* Just. said, There is a great Difference between Trespas and Trover, as to the Action being local, &c. For Trespas is local, but Trover is transitory; Trover lies for Trees, when they are cut down, because then they are Chattels; but before they are cut down they participate of the Nature of the Land, and Trespas lies. But suppose, after a Man has cut down a Tree, if he carries it away, cannot he be indicted for Felony? *Holt* Ch. J. No, but Trover lies for carrying it away; for 'tis a Chattel, so soon as 'tis severed from the Freehold; and for the Severing thereof Trespas lies.

Trespas is local, but Trover transitory, &c.

Note.

The Case of Abbot against Burton in C.B.

(7.) **A.** Seised in Fee, in Right of his Wife, of Lands which she had by Discent, on the Part of her Mother. The Husband and Wife by Deed covenant to levy a Fine, which is thereby declared should be to the Use of the Conusees, and their Heirs, to make them Tenants to the *Præcipe* in order to suffer a common Recovery; and afterwards such Recovery was had accordingly, which by the same Deed was declared should be to the Use of the said A. for his Life, and to his said Wife for her Life; and then to the first, and every other Son of their two Bodies in Tail (Male), Remainder to the right Heirs of the Wife; with a *Proviso* or Power for the Wife, during the Coverture, to dispose of the Remainder (or Reversion) in Fee as she should think fit. A. and his Wife die without Issue, and without any Disposition, made by the Wife, of the said Remainder or Reversion, in Pursuance of the said *Proviso* or Power. This Case being found specially, the Question was, whether the Lessor of the Plaintiff, who claimed as Heir to the Wife on the Part of the Mother, had a Title to these Lands: Or, whether the Defendant, who

The Nature and Effect of Common Recoveries, as to the Raising or Altering of Uses, &c.

A a a

claimed

claimed the same Lands as Heir to the Wife on the Part of the Father, had a Title to them. Wherein the Court of C. B. unanimously gave Judgment for the Plaintiff; and the Lord Chief Justice *Trevor* delivered the Opinion of the said Court to this Effect: *Viz.*

In the Arguing of this Case, it has been insisted on for the Defendant, That there is a Difference between a Use resulting by Implication of Law, and an Use limited by exprefs Words; and *Hob. 31.* and *Dyer - -* have been cited for that Purpose: But we are to consider how this Point stood before the Statute of Uses. Before that Statute, the Law considered the Estate of the Land, and the Use of the Land as two distinct Things; and therefore before that Statute, If a Man had made a Conveyance, either by Deed of Feoffment, or any other legal Conveyance, he might therein by exprefs Limitation have declared the Use of the Land; or if there were no exprefs Limitation, the Law gave it back to him again; for he was not to pass away the Pernancy of the Profits, without some Consideration, or Estoppel, by exprefs Limitation; so that a Man might at Common Law have separated the Use and the Estate; and tho' the Use and Pernancy of the Profits were neither created nor guided by the Common Law, yet the Law took Notice of them, and that *Cestuy que Use* had a Remedy by *Subpoena*; so that this Use was taken Notice of as distinct from the Land, even at Common Law; then comes the Stat. 27 H. 8. and what Alteration that made is to be considered.

This Statute executes the Possession of the Land in the same Plight and Manner as the Use was before; therefore as this Conveyance is, this antient Use, which results back was not a new Use; for it must be an old Use, if it results back as not disposed of; and so much of the antient Use still remains in him as was undisposed of. Now if the Use would have gone this Way before the Statute, it will still go the same Way since the Statute. It is the same Thing whether the antient Use comes back by Implication of Law, or by Limitation of the Party; for that the Construction of the Law is founded on a Supposal of the Intention

Intention of the Party, and will convey and carry the Use the same Way as 'tis supposed the Party would have done.

Now if the Law be so in the Case of a resulting Use, which arises by Implication of Law, what Reason is there, it should have a different Construction where there is an express Declaration of the Party; (especially) since this Declaration makes no Alteration of the Estate; and the other Uses limited to A. and his Wife, is only a new Interest arising out of the Conveyance only, because 'tis not so large an Estate as the Fee was before. But where the Limitation is in Fee it makes no Alteration, because the one is as large an Estate as the other. And it is still the same Relidue remaining in the Wife, which she had not disposed of before, that is a Part taken out of the whole, and of the same Nature as the other was; and this appears so, not only from the Reason of the Thing, but there are other Authorities also which seem to settle this Point. 2 Rol. Rep. 78. 1 Co. 100. 2 Co. 91. 1 Inst. 22. And it is all one, whether this antient Use in Fee was created by Implication of Law, or by express Limitation of the Party, if it be of the same Estate. 3 Lev. Godbolt and Freeston's Case. These Authorities are Law.

My Brother, who argued for the Defendant, endeavoured to difference this Case from that in *Levinz*; and insisted on two Things: *First*, That this was not an immediate Conveyance, as a Feoffment to a Man in Fee, but that here was a Covenant to levy a Fine, which is to be to the Use of the Conuzees, and their Heirs, with an Intent to have a Common Recovery; and hereupon the chiefest Objection is, that not only the legal Estate but also the Use passed to the Conuzees, both in Law and in Equity. So that when a Recovery was suffered, this Use in Fee must arise out of the Estate of the Conuzees. This carries the Case a Step further than that in *Levinz*, and 'tis fit I should give an Answer to it: Now this Opinion seems to me to be grounded on taking this Common Recovery in a wrong Sense; for this Fine and Recovery may

be

A Deed, a
Fine, and a
Recovery,
but one Con-
veyance.

be taken as two different distinct Conveyances; and taking it as such, it is subject to this Objection. But as it may be taken as two several, it may as well be taken as one single Conveyance; and the Deed, the Fine, and the Recovery, may well be taken as several Parts of one and the same Conveyance, which is the Case in Question, and easily resolved: For where such a Conveyance is made by Deed, Fine, and Common Recovery, tho' the Estate does move from one to another, (as Conduits,) yet the Estate originally moves only from the Conusor, and the Estate is always in a Manner in him; as if the Estate be declared to one for Life, Remainder in Tail, and no Limitation of the Use of the Fee; the Use shall result back to the Conusor, and not go to the Conusees or Recoverors. And so if there be a Limitation of the Use of the Fee, that Use shall and must arise out of the Estate of the Conusor, and not out of the Estate of the Recoverors. *William's Case* in the Queen's Bench, is the same as this expressly. There was a Power of Revocation, and a Covenant to levy a Fine; and after that was done, it was questioned, whether the Fine levied had not destroyed the Power? But 'twas held, that the Deed and the Fine were but one Conveyance, and not any Destruction of that Power, being contained as it were in one and the same Deed, they both making but one Conveyance, and from the very Nature of the Thing were to be esteemed only as several Parts of one entire Thing; and if the Use be to the Conusees in Fee, in this Case it was not to give them an Estate in the Land, but in order to suffer a Recovery; and their Estates are determined by the Recoveries being to them for that particular Purpose only. But as I said, the Estate moves originally from the Conusor; what he has not parted with is still in him, and therefore so much thereof, as is not declared upon the Recovery, shall be still to the old Use; the Nature of the Common Recovery being but as an Instrument for raising of the Use.

Note.

The second Thing insisted on for the Defendant was, That here is a Power reserved to the Wife, and this 'twas said had altered the Estate, it being subjected and subser-

vient

vient to a new Power; for that now she might dispose of it in another Manner than she could do, had it been only her old Interest. *Answer.* I do not take this to be any new Use, or to have altered the old Estate: It is only a Right (or Power) of disposing of the Inheritance, which otherwise she could not have done, this being only a new Qualification of the old Estate. Where an Estate has a new *Qualification* depending upon a new Contingency, or where an Estate is made liable to be disposed of in a new Manner, such Power, until it be executed, doth not alter the former Use of the Land. If she had pursued the Power, no Doubt all those Uses had been new Uses: Because in such Case there had been a new Estate created out of the old Estate; and they would have come in as if their Estate had been particularly limited. But before that Power is executed she has only her antient Inheritance, and the former Estate still exists. If a Man conveys an Estate to the Use of such Persons as he shall appoint by Writing, in the Presence of A. and B. Till he has executed this Power, the Use of the Fee is the same as it was before; and subject to be determined only by the Execution of such contingent Power, which by such new Provision does subsist upon and affect the Land, and till that be executed, he is Tenant in Fee as he was before. So if a Man makes an Agreement to marry his Son, and 'tis agreed that the Use shall be to the Man in Fee, till the Marriage takes Effect; this is still the old Use, but determinable upon a new Contingency, which he hath subjected it to by this new Conveyance; so that this Power will not alter the Estate at all; and till the Power is executed in this Case, she had her old Estate in her, *i. e.* the Residue of what she had not disposed of, which was the Remainder in Fee; which being derived to her *ex parte materna*, the Plaintiff ought to have his Judgment.

Mich. Term. 1708.

7 *Annæ Reginae* in *B. R.**Bishop* vers. *Eagle.*

Account as
Receiver, not
paying by
whole Hands,
ill. 2.

(1.) **O**N a Motion in Arrest of Judgment, That in a Writ of Account, brought by the Church-wardens of *St. Bartholomew London* against the Defendant, Judgment was for the Plaintiff, that the first Judgment ought to be *Quod computet*. *Salkeld* said, The Declaration supposes, that the Defendant received several Sums of Money, *viz.* by the several Persons herein after-mentioned, the several Sums herein after-mentioned. That an Action for an Account ought to be a precise Charge. 43 *E. 3.* 21 and 23. *b.* That Account ought to be certain; and if Part of the Declaration be uncertain, Judgment *Quod computet* shall not be as to that, but only as to what is certain. Secondly, They ought to be charged as Receivers, and not as Bailiffs. 2 *Lev.* 126. *Econtra*, The Plaintiff is the present Church-warden; and the Defendant is the last Church-warden; and that he is well charged as Receiver; and should he have been charged as Bailiff they ought to have pleaded it. 2 *Lev.* 126. 1 *Sid.* 39. Then 'twas said, They ought not to be charged *per manus Parochianorum*, but by particular Names, for the greater Certainty.

Mr. *Eyres* (cont.) By the Defendant's pleading, that he was not *Church-warden*, he has admitted the Charge in the Declaration. 3 *Keble* 425. 2 *Lev.* 126. 1 *Roll Abr.* 391. *Co. Lit.* 172.

Dee, (Common Serj.) A Receiver need not be charged by whose Hands he received, &c. *Dyer* 183. *Cro. Eliz.* 749. And to avoid Prolivity in the Pleadings, the Defendant ought to have demurred. 1 *Roll Rep.* 391. 2 *Lev.* 126.

Cheshire, Serj. for arresting the Judgment, urged, If the Nature of the Action requires, that Particulars should be shewn, 'tis out of the Reason of the Cases about Prolivity of Pleading.

Powell Justice. Actions of Account between Merchants need not set out the Particulars; *quasi dicat*, but otherwise here. A Church-warden must be charged as Receiver; and the Receipt is traversable, and you must say by whose Hands, and go to the Country; or else, if you do not say by whose Hands, he may wage his Law; because it shall be presumed to be from the Hands of the Plaintiff himself, and therefore in such a Case he may wage his Law. *Per Manus Parochianor'* is very general, and he thought they ought to have set out the particular Receipts of the particular Persons: But if that Case in *Levinz* be as 'tis cited, then *per Manus Parochianorum* will be as if they had not set out by whose Hands at all. But the Question is, whether, by their taking Issue upon a collateral Plea, they do not come too late to except against the Incertainty of the Declaration. (As it was in that Case in *Levinz*.)

Wager of Law *infra*.

Holt Ch. J. They come now upon the *Plaintiff's* being returned, before Judgment *quod computet*; And *quoad* that Part of the Declaration which charges the Receipt *per Manus Parochianor'*. We may well abate it, (for 'tis imperfectly charged and uncertain,) and give Judgment *Quod computet* as to the rest. And the Court abated it, as to the uncertain Charge for the 100*l.* and said, if Judgment *Quod computet* had not been given, then he would lose the Benefit of Costs upon the Plea of the collateral Matter. *Q.* *Holt* also said, *Ley gager* was originally introduced for the Benefit of the Plaintiff; and that 'twas supposed the Defendant would, upon the Sacredness of his Oath, discover more than the Plaintiff could charge or prove; and therefore, unless the Defendant in such Case would purge himself by Oath, the Plaintiff should recover.

Account abated in Part, and Judgment *pro Residue*.

The

The Queen and The Mayor, &c. of Hereford.

Construction
of their Char-
ter, as to their
Power of ma-
king Fo-
reigners Free-
men.

(2.) SIR Simon Harcourt argued this Case thus: There are three Charges in this Information. *First*, For taking Men *non in communitatem Burgi*. *2dly*, For taking Men not of the Town. *3dly*, For making them free of the Burrough. The Charter of K. Ph. and Q. Mary says generally, That they make *omnes homines quoscunq;* but no restrictive Words are therein, and so it gives no more than the Law gives. 10 Co. - King James I.'s Charter says, not exceeding three. King Charles II. grants them to use, exercise, &c. in all and every such Manner as theretofore they had done; and this seems to restore Q. Mary's Charter and to enlarge K. James's; so that this Issue about acting under K. James's Charter is immaterial.

Mr. Lutwich. The Charter of K. Charles II. has, by Way of new Grant, given them every Privilege they had before. The Question was, whether there being no restrictive Words in Q. Mary's Charter, *If thereby they might by Law have taken in whom they had pleas'd, into their Corporation, from any Part of the Kingdom,* when the Queen incorporated the Men of such a Place only. Queen Mary's Charter grants them a Power to make *Omnes homines quoscunq;* Tenants and Inhabitants; and the Charter Jac. 1. restrains them to three. K. Charles II. grants them to exercise, use and enjoy all Privileges they at any Time before ever used. 'Tis objected, that the Issue being upon K. James's Charter was immaterial, Q. Mary's Charter being restored by the general Grant of K. Charles II. Another Objection is, that in the *Distringas* 'tis not said in what Cause. *Rast. Ent. 330, 125 or 225.*

Solicitor General. The affirmative Grant imports a Restriction in the essential Part of the Corporation, and not to be compared to the Cases of By-Laws, &c. For they are generally incident to all Corporations; but this is particular.

Powell Justice. The Question is, whether this Corporation can make Persons free thereof which live out of the Town. *Holt* Ch. J. As this Corporation is constituted, all Persons that are Inhabitants are of the Corporation as such; and he said they were Freemen; But *Powell* thought that would be of dangerous Consequence, that by their meer coming and inhabiting there, they should gain a Freedom: (But doubtless by the antient Common Law, a Residence for a Year and Day, within any Free Burrough, made the Party free of that Burrough: And tho' he was a Villein before, he thence-forward became a Freeman.) Note; This Case was ordered to stand in the Paper to be solemnly argued.

Ford vers. *Ossulston*.

(3.) A Devise was to a Man with several Remainders; and a Remainder over to the Heirs Males of the Devisor. The Question was, If a collateral Heir Male could take by this Devise? And the Court were clear, he could not; and that the Testator not having an Heir Male of his Body at the Time of his Death, they held it a void Limitation; and said, in the King's Case of a Grant to the Heir Male, 'tis void; but in that of a common Person, 'tis a Fee, and the Word Male is idle. For Heirs Males, &c. in a Will are always intended, of the Body, and implies an Estate-tail. See *Pybus* and *Mitford's* Case in *Ventriss*, &c.

Devise to Heirs Males void, if none of the Body living; for it implies a Tail.

Queen vers. *Prew*.

(4.) SIR *Peter King* moved to quash an Indictment against a Serge-maker, for dying his own Serges, he not having served as an Apprentice to the dying Trade; for that it was not said in the Indictment, that he was a common Dyer, and that he might lawfully dye his own Wool; and he said, it was so adjudged in a Case, where because

it was not laid a common Baker, 'twas held ill; for any Man may bake for himself, and so he may dye, &c. But the Court held the Indictment well enough, being not like the Case of a Baker; for many People bake their own Bread, but a Dyer is a separate Trade. And *Holt* cited a Case, where a Comb-maker was indicted for exercising the Trade of a Horn-presser, tho' he used Horn for making his Combs; and 'twas adjudged it lay, because 'twas a distinct Trade.

Walker vers. Atwood.

A Bill of Exchange has no Day mentioned when it should be paid; when it is accepted, a Narr' upon it must be upon the Custom, tho' the Promise be to pay at a future Time, and not on the new Agreement.

(5.) **A**N Action was brought on a Bill of Exchange; The Bill was drawn the 8th of *April* 1707. upon *Atwood*, to pay 15 *l* to *Godfrey*; the Bill being shewn to *Atwood*, he promises to pay it 18 *April* 1707. Afterwards this Bill was assigned to *Walker*, who brings this Action, and declares on the Custom, &c. Upon a Demurrer to the Declaration, Mr. *Salkeld* for the Defendant said, That the Bill being to pay a Sum of Money, and no Day said when it should be paid, it must be paid on Sight; *Ergo* this Promise to pay two or three Months after, viz. the 8th of *Sept.* is a new Agreement, and consequently the Action must be founded on the new Agreement, and not upon the Custom of Merchants.

Powell J. The Custom of Merchants is by the Acceptance, and a Promise to pay at such a Time is good, and he is bound by the Custom of Merchants, by Acceptance, to pay at the Time appointed, and therefore the Plaintiff has declared well on the Custom of Merchants; and if it should not bind him on the Custom, it would not at all, because no *Indeb' Assump'* lies on the Acceptance. Judgment was given for the Plaintiff, *Nisi*: By *Powell*, *Powis Gould*. *Holt C. J.* absent.

Anonymus.

Anonymus.

(6.) **A** Man being excommunicated for not Payment of Costs, in a Suit for Tithes in *Cur' Christian.* Mr. *Lutwyche* moved to discharge him, he being in Custody upon an *Excom' Capiendo*, because he was listed a Soldier according to the Act of Parliament, which says, *If any Person being in Custody upon any Process, &c.*

One taken on an *Excom' Capiendo* discharged, he being listed a Soldier according to the Act.

The Court did not discharge him upon this Motion; but after, it being moved again, *Holt Ch. J.* said, Since the Judges of *C. B.* are of Opinion, that a Man in Execution shall be discharged, being listed as a Soldier, that a Man in Execution on an *Excom' Capiendo* is within the same Reason; and therefore by the Court he was discharged. But he said, he never was of Opinion, that this Act should extend farther than mean Process, and not to Persons in Execution. *Vide post.*

Wells vers' Ferguson.

(7.) **D**EBT for 15*l.* brought by *Alex. Ferguson* vers' *Tho. Wells*, on a Bond dated 26 October 1705. Upon Oyer of the Condition, it was set forth; Whereas *John Wells* the Son of the said *T. W.* the Plaintiff, did put himself Apprentice to the said *Alex. F.* for seven Years; and whereas the said *John Wells* is desirous to be acquitted of the said Apprenticeship, and to have his said Indentures delivered up; and whereas the said *Tho. Wells* and *Alex. Ferguson* are agreed, that for and in Consideration of the Delivery up of the said Indentures, and Acquitting the said *John Wells* of his Apprenticeship, he the said *Tho. Wells* has paid unto the said *Alex. Ferguson* two Guineas in Gold; and has agreed to pay off or otherwise indemnify the said *Alex. Ferguson*, of and from the Payment of a certain Note, given by the said *Alex. Ferguson* to one *Charles London*, the former Master of the said *John Wells*, for Payment

ment of 4*l.* to *Charles London, &c.* Now the Condition of this Obligation is such, that if the said *Tho. Wells*, his Executors and Administrators, shall and do, before any Suit or Action brought, &c. by *Charles London*, his Executors and Administrators, &c. on or by Reason of the said Note against the said *Alex. Ferguson*, his Executors, &c. cause or procure the said Note to be delivered up to the said *Alex. Ferguson*, his Executors, Administrators, &c. to be cancelled, or otherwise that the said *Alex. Ferguson* be sued and compelled to pay the said Sum of 4*l.* to the said *Charles London*, his Executors, &c. and that he the said *Tho. Wells*, his Executors, &c. do not then immediately repay such Sum of 4*l.* to *Alex. Ferguson*, his Executors, &c. with all Costs, Charges and Satisfaction of all Damages sustained by Reason thereof, or the Prosecution thereupon, he or they having Notice left of such Prosecution; then the Obligation to be void and of none Effect, or else to stand, remain and be in full Force and Virtue.

After Verdict, it was moved in Arrest of Judgment: And
 5 Co. 22. b. Mr. *Raymond* for the Defendant said, the Plaintiff had no Cause of Action; for the Condition being in the Disjunctive the Defendant may perform which Part he will, and here he has performed the latter Part, *viz.* he has not repaid the Money, and the Condition of an Obligation shall not be construed contrary to the express Words, tho' the Parties intend otherwise; and to maintain this, he cited *Plowd.* 30. *Allen* 9. *Stiles* 12. *Jugledew v. Crisp*. Debt on a Bond penal reciting, that the Plaintiff had agreed to sell the Defendant so many Stacks of Wood, the Defendant covenanted to pay for every 100 Stacks 35*l.* An Action was brought for 310*l.* for so many 150 Stacks; Demurrer; and Judgment for the Plaintiff; because the Agreement being for every Hundred, and not said *secundum Ratem*, he could not recover. 1 *Lev.* 77. *Vernon v. Alton*. * Debt on a Bond, conditioned to pay 7*l.* by 2*s.* per Week till the 7*l.* is paid; and if he fail of Payment of the 2*s.* at any of the Days it ought to be paid, the Obligation to be void; adjudged the Condition shall be taken distributively. 1 *Sid.* 105. 1 *Keb.* 306, 416, 451.

* Note: The Book is directly contra for what 'tis here cited.

But for a Case in Point he cited 34 H. 6. 10. where was *Littleton's* Opinion; that if a Man bind himself in an Obligation of 100*l.* where the Condition is, that if the Defendant does not pay the Obligee 10*l.* that the Obligation shall be void; this shall avoid the Obligation, tho' the Intent was otherwise; because the Words of the Condition must be observed.

Mr. *Williams* for the Plaintiff said, That if the Condition be not, that he shall pay off that which the Bond is given to secure, the Condition is inconsistent. Besides, 'tis recited in the Condition of the Bond, that 'tis agreed the Defendant shall pay off the Note or indemnify. Therefore 'tis plain 'tis a repugnant Condition, and the Rule is, that when the Condition is repugnant and insensible, the Obligation is single; to prove which he cited 2 *Saund.* 78. 1 *Mod.* 35. 1 *Lev.* 77. *Raym.* 68, 1 *Sid.* 105.

Holt Ch. J. The Condition is, that if he delivers up the Note before it be put in Suit, or if it be put in Suit, and the Plaintiff forced to pay, and then if he does not repay the Money the Obligation to be void, &c. this is a Contradiction and Repugnancy.

Powell. The Case in the Year-Book is as Mr. *Raymond* has put it; but that differs much from this, for there was no Repugnancy. But here the Recital in the former Part of the Condition is repugnant to the latter Part. Upon this Argument it was adjourned with a *Curia advisare vult* till another Day in this Term; and then the Court gave Judgment for the Plaintiff.

And *Holt* C. J. said, the Condition was repugnant; and no Difference between this and *Vernon* and *Alsop's* Case, 1 *Lev.* 77. And he said the Case in 34 or 39 H. 6. 10. was not Law.

Bendish vers. *Lindsey.*

(8.) THE Plaintiff declared, that he being *Bonus, verus, honestus, probus & fidel' subdit' & ligeus Annæ Reginae, &c.* and having good Interest among the Burgesses of the Burrough of *Cambridge*, and standing as a Candi-

Words spoken
of a Candi-
date at an E-
lection of Par-
liament-men.

D d d

date

date for that Burrough, the Defendant *existens Burgenfis ejusdem Burgi Cantabr', & habens suffragium in Electione & retorno Burgenfium Parliamenti pro Burgo præd' in Parlamento defervitur', præmissor' non ignarus, sed machinans & malitiose intendens ipsum the Plaintiff minus rite prægavare, &c.* and to hinder him from being chosen, holding in his Hands three Guineas, in the Presence of many People, Burgesses of the said Burrough of Cambridge, *tunc & ibidem palam, publice false & malitiose dixit & asseruit & propalavit de eodem the Plaintiff, hæc falsa, ficta, malitiosa & opprobiosa verba Anglicana sequentia, viz. these Guineas, (innuendo præd' has pecias auri cuneat' vocat' Guineas;)* and two more (*Innuendo duas al' pecias auri cuneat' vocat' Guineas, and two Half Guineas*) are Mr. Bendish's, (*eundem the Plaintiff innuendo*) his Money, and were given me to vote for him, and he has bought (*innuendo suffragium ipsius the Defendant,*) and he shall have it; upon Issue joined, and a Trial and Verdict for the Plaintiff, it was moved in Arrest of Judgment, *viz.* Exceptions were taken by Mr. Thompson for the Defendant, 1st, That these Words are not actionable; for no Words are actionable except they subject the Plaintiff to a Temporal Punishment, or a special Damage, and here is nothing spoken that will subject the Plaintiff to an Indictment on the Statute. And Co. 145. says, Bribery is when one takes a Fee in a judicial Place. His second Objection was, that the Words are insensible, for when the Plaintiff has given the Money to the Defendant, it cannot be the Plaintiff's Money. Third Objection, that it is not aver'd through the whole Pleading, that the Plaintiff did not give the Money, &c. Fourth Objection was, that the Sheriff *præceptum suum misisset Majori præd' Burgi Cantabr' ad Eligend' & returnand' duos Burgenfes ejusdem Burgi ad essend' & deservieud' pro Burgo præd' in Parlamento illo, &c.* and it should be to the Mayor and Burgesses; and (*Ergo*) the Speaking these Words is no Offence, in Case of such an Election.

Holt Ch. J. It need not be averred that the Plaintiff did not give the Money to the Defendant to vote for him, for 'tis said, *hæc falsa, ficta, malitiosa verba*, which

is well enough; and as to the Precept being directed to the Mayor to chuse, and not said to cause to be chosen, he said, 'twas well enough after Verdict; because it must be proved at the Trial that the Election was made by the Burgeses; and as to the Merits of the Cause, he was clear of Opinion that the Action lay; and Judgment was given for the Plaintiff, *per Holt Ch. J. Powis and Gould. Powell absent.*

Queen vers. Shaftow.

(9.) **I**ndictment for saying *you are an informing Rogue, an informing Rascal, and an informing Villain*, (knowing him to be a Justice of the Peace.)

Indictment for Words said of a Justice of the Peace.

Vide ante *Queen vers. Wrightson.*

Mr. *Lutwich* moved to quash this Indictment; and *per Cur'* it was quashed *nisi*, the End of the Term; for Words said of a Justice of Peace are not indictable, according to the late Resolutions between *Queen* and *Wrightson*, *Pasche 7 Anne Reg. ante; sed Quere.* For this Point is very unsettled, it depending much on what is called *Discretio Curie.*

Bennet vers. King.

(10.) **A.** Said to B. that *she made her Husband a Cuckold*; B. libelled against A. in the Spiritual Court; and Mr. *Southouse* moved upon Suggestion that the Words were spoken in *London*; and tho' 'tis not calling her *Whore* directly, yet 'tis Calling her so by Implication.

Prohibition for Scandal in London by Implication.

Holt Ch. J. If the Custom of *London* extends to punish a Woman that makes her Husband a Cuckold, then a Prohibition may be granted; for the Foundation to grant a Prohibition, for Calling a Woman *Whore* in *London*, is, because they by Custom punish Whores there by Carting them; and an Action lies there for Calling a Woman *Whore.* And afterwards at another Day this Term they granted a Prohibition, because these Words are actionable in *London.*

Tate and Whiting.

Promise to the
Intestate, and
a Promise to
the Admini-
strator joined,
Remit damna
to one helps
it.

(11.) **A** *Sumpsit* upon several Promises brought by an Administrator *cum testamento annexo*; two whereof were made to the Intestate, and the third laid thus: Whereas the Defendant *Tate* was indebted to the Intestate, and Letters of Administration granted to the Plaintiff: He the Defendant, in Consideration that the Plaintiff would forbear to sue, promised to pay. (This was in Error out of C. B.)

Mr. *Whitacre* for the Plaintiff in Error said, that these Promises could not be joined; for that the last Promise is made to the Administrator himself; and 'tis a Question, whether the *Remittit damna*, which was entered after Verdict, will help it; and cited *Shower* 366.

Holt Ch. J. said, He would not allow that Book as an Authority. But yet he admitted, that these Promises could not be joined, and upon a Demurrer it had been ill; but now the *Remittit damna* has cured it. For if Baron and Feme join in an Action of Battery, for the Battery of both, if the Defendant be found Not guilty as to the Husband, and guilty *quoad* the Wife, and a *Remittit damna* be entered as to the Husband, 'tis good, tho' *prima facie* they could not join; and so in this Case. Judgment was affirmed.

Busbel verf. Burland.

(12.) **I**N Ejectment on a special Verdict, the Case in short was, *A.* and *B.* his Wife, levied a Fine; and four Years after they make a Deed to declare the Uses, in which there are these Words, *All and every Fine or Fines levied, or to be levied, shall be to the Uses of the Deed.*

This Case was argued in Term Pascha 7 Anna Regina by Serjeant *Pratt* and Serjeant *Hooper*, and adjourned to this Term.

Serjeant Pratt argued, that the Fine was good ; for tho' the Deed was long after, and these Words, (*All and every Fine or Fines, levied or to be levied, shall be, &c.*) yet the Jury find that it related to the Fine before levied, and insisted on *Dowman's Case*, in 9 Co.

Serjeant Hooper cont. argued, That *Dowman's Case* was before the Statute of Frauds and Perjuries, when Declarations of Uses might be by Parol ; and made several Differences between this and *Dowman's Case* ; and if this was good, where was the Freehold all the while between the levying of the Fine, and the Execution of the Deed ; and besides, by the Words of the Deed, it is plain it related to a subsequent Fine ; and he said, that the Verdict does not signify any Thing here ; for if the Jury find what is not Law, it does not avail ; as suppose they had found the Declaration of Uses had been by Parol.

Holt Ch. J. and the Court said, that the first Fine would be to no Use, if this Deed does not relate to it ; and *Bekwith's Case* in 2 Co. says, it shall be good, if the Wife does not declare the contrary : If a Fine be levied by Husband and Wife in Vacation, and they make a Deed of Uses of a Fine levied in *Trin. Term*, (as in Judgment of Law it is) 'tis good, tho' since the Statute of Frauds and Perjuries ; and there is the same Objection as to the Freehold being in Abeyance, and the Time does not make any Alteration.

Or if a Man levy a Fine, and the Deed is lost, and four Years after he make another Deed, the Fine is good.

The Stat. of Frauds and Perjuries is out of the Case ; for it is thereby declared that all subsequent Deeds shall be as they were before. *Sed adjournatur.*

Langthorn vers. Taylor.

(13.) ERROR on a Judgment in C. B. In Debt upon the Return of an *Elegit*. The Declaration was, that *M. Clayton* by Indenture demised a House, and certain Goods mentioned in a Schedule, for twenty-one Years, if

E e e

the

the said Lives so long live. That the Plaintiff recovered a Debt of 300*l.* against her, and Execution thereon.

Raymond excepted, That the Execution was taken out pending a Writ of Error; and that all the Precedents are, That it ought to appear to be with an *Affirmetur*. 1 *Sand.* 182, 233. 2 *Sand.* 238 or 233, and 317. And that it not appearing here that the Judgment was affirmed, 'tis erroneous.

Holt Ch. J. It must either be a *Non prof.* or an Affirmance. You have indeed shewn, that the Execution was suspended by the Writ of Error, and therefore they ought to have shewn a Declaration before they took out Execution.

Butler vers. *Cozens.*

Where full
Costs in Tres-
pafs, &c.

(14.) *SIR Peter King* moved to have full Costs in an Action of Trespafs, *inter alia*, For Breaking his Lock upon his Gate; and cited 2 *Vent.* 215. and 3 *Mod.* 39. *Curia.* Had it been for taking away the Lock, full Costs might have been given. *Powell* Just. But this seems to be laid as a Trespafs in order to try the Title; and where the Freehold comes in Question, there 'tis held full Costs shall be: But where the Freehold does not come in Question, there no more Costs than Damages. But if the Judge certifies the Trespafs to be voluntary and malicious, there the Costs are to be full, by Stat. 22, 23 *Car.* 2. c. 9. But 'twas adjourned to see if the Judge who tried the Cause would certify.

Withers vers. *Baker.*

Declaration
amendable,
&c.

(15.) *I*N this Case *Holt* Ch. J. declared, That by the Course of the Court, a Man may amend his Declaration the second Term; but that when the Declaration is amended, new Rules for Pleading must be given; for the Plaintiff perhaps must thereby be put to a new Defence. The Plaintiff the second Term may amend, but not change the

the *Venue*, tho' Issue be not joined, nor in any Case after-^{*Venue*}wards. For in transitory Actions the Plaintiff has his Election to lay his Action where he pleases; therefore he shall not change it. Tho' the Defendant may, on Cause shewn.

Wells verf. Ferguson.

(16.) **A** Bond was for 100*l.* with a Condition, That if he did not pay 50*l.* by such a Day the Bond should be void. The Court adjudged the Condition to be repugnant, and the Bond to be single. 2 *Lev.* 77. Note; In this Case *Holt* denied the Case 39 *H.* 6. fo. 10. a. to be Law. *Vide ante.*

Bond with a repugnant Condition, the Bond is single.

Adams verf. Hincloe.

(17.) **U**PON a special Verdict the Question was, Whether a Copyhold could be entail'd, without laying a special Custom for so doing; and adjudged *per tot' Cur'*, That it might.

Copyholds entailable *sans* special Custom.

And *Holt* Ch. J. rejected the Notion of my Lord *Coke*, about the *Stat. de donis* co-operating with the Custom; and held that that Statute turns all those Estates, which at Common Law were Fee-simple conditional, into Estates-Tail. He said, if a Copyholder by Licence makes a Lease for Years, the Surrenderee (Lessee) of that Copyhold is within the *Stat.* 32 *H.* 8. to bring Debt as Assignee.

Hill.

Hill. Term. 1708.

7 *Annæ* Reginae in B. R.

The Queen vers. *Lord Drummond*.

Holt Ch. J.
Powell, Powell
and *Gould*
Justices.
Recognizance
to appear, re-
spited, not
discharged.

(1.) MY Lord *Drummond* stood bound by Recognizance to appear here the first Day of this Term; and Sir *Simon Harcourt* excusing his Non-appearance by Reason of Sickness, moved, That his Recognizance might be discharged, the Attorney General having Orders, and being in Court consenting thereto. But *Holt* Ch. J. said, Notwithstanding such Consent, my Lord *Drummond* not appearing in Person, the Court could not discharge the Recognizance. But said, they could respite it till the next Term; which was done accordingly.

Sawyer vers. *Loggin*.

Striking and
Brawling in
the Church-
yard.

(2.) AN Information was for Striking in the Church, and an Acquittal thereon; and then they exhibited Articles in the Spiritual Court for Brawling in the Church; whereupon the Defendant moved this Court for a Prohibition. And for the Prohibition it was suggested, that where a Man is acquitted at Common Law, he ought not to be cited or sued in the Spiritual Court; and shew'd, that an Information was exhibited against him for the same Battery, and that he was acquitted, &c.

Sir *Peter King*, Recorder of *London*, also for the Prohibition said, That the Striking and Brawling were so twisted together that 'tis all the same Fact, and one Offence; and therefore

therefore being acquitted at Common Law, the Plaintiff cannot proceed afterwards in the Spiritual Court, for the Common Law should have Preference; and cited 4 Co. 20. That if an Offence is committed which is partly Temporal and Part Spiritual, the Temporal Court shall draw the whole Offence; and they shall not proceed in both Courts. And Acquittal or Conviction in the Temporal Court shall be a Bar in the Spiritual.

But the Court would not grant the Prohibition, because they should have pleaded this Matter, which they suggest here, in the Spiritual Court; and if they had refused the Plea, then they might have justly come and moved for a Prohibition.

Powell said, Brawling and Striking in the Church were two distinct Offences; and tho' they cannot proceed in the Spiritual Court for the Battery, after an Acquittal at Common Law, yet they may go on for the Brawling, for the Common Law has not Consuance of the Brawling; which Holt Ch. J. seemed to agree: But said, that it would be hard to proceed in the Spiritual Court for the Brawling, after an Acquittal at Common Law for the Battery. But for the Cause aforesaid a Prohibition was denied.

Sumner vers. Ferryman.

(3.) DEBT for 60 l. on a Bond dated 16 August 1706. Upon Oyer of the Condition, it was set forth in hac Verba, viz. The Condition of this Obligation is such, that if Nicholas Hooper do and shall appear before the Mayor, Aldermen, Bailiffs, and Under-Steward of the Burrough of New Windsor, at the next Court of Record, to be holden at the Guild-hall of the said Borough, on the 19th Day of August instant, there to answer to Will. Davis, Benj. Child, and Benj. Tompkins, in a Plea of Trespass on the Case, then this Obligation to be void, or else in full Force, &c. The Defendant pleads in Bar, that he was Servant to Nic. Hooper, and that he was imployed by Hooper in governing a Barge,

A Barge attached, the Governor gave a Bail-Bond for his Master to appear in Wind- for Court, &c. and the Bond held good.

laden with several Peoples Goods, from Oxford to London; and that in his Voyage, upon the River of Thames, near New Windsor, the Bailiff of New Windsor, pretending to have Process against Nic. Hooper, and Power and Authority to attach the Goods of Hooper, did attach the Barge, then being *sub Custodia & gubernatione* of the Defendant, of which Hooper was Master, and so hindered and detained them from going their Voyage, and refused to let them go, unless the said John, the Defendant, would give the said Bond to the said Bailiffs; so that the said Defendant, to free the Barge, and that he might deliver the Goods to the Owners, gave the said Bond with the Condition; *ubi re verâ* no Bailiff ought to take such a Bond; and that it was took *extorsive*, &c. *Et hoc parat' est verificare*, &c. To this Plea the Plaintiff demurs, and the Defendant joined in Demurrer.

Mr. Pengelly for the Plaintiff said, that this was a good Bond, and shall not be avoided by Durefs, for there is no Assault or Restraint to his Person; and a Bond shall never be avoided by Durefs, but when the Person is put in some Terror, and so when his Goods and Chattels are taken illegally or irregularly; for if the Case was so, he might avoid his Bond. But here he shall not avoid this Bond, because regularly taken; and cited 7 Ed. 4. 22. Bro. Abr. tit. Durefs pl. 16. 2 Inst. 483. Co. Litt. 253. b. Roll Abr. tit. Durefs 687. and therefore the Plea does not avoid the Bond; and the Condition not being against Law, the Plea is ill; and so prayed Judgment for the Plaintiff.

Mr. Raymond for the Defendant said, they had no Authority to distrain this Barge, and therefore the Bond was void. There was indeed an Action against Hooper, but it does not appear that this was his Barge, only that he was Master of it; also there were Goods of other Persons in the Barge; and Things for the Benefit of Trade shall not be distrained, like the common Case of a Horse in a Smith's Shop, &c. And as to what Mr. Pengelly said about Durefs, he cited a Case out of *The Book of Ass.* 29. pl. 14. which Case is abridged in Roll Abr. tit. Durefs 687. Where a Man made a Deed by Durefs done to him by taking his Cattle,

Note Durefs
quid.

Cattle, and tho' there was not any Durefs to his Person, yet it was adjudged he should avoid the Bond: Then it may be objected, that tho' he may avoid a Bond by Durefs to his own Goods, yet not to the Goods of Strangers, as these were; to which he answered, that the Barge-man had a special Property, &c. and for these Reasons prayed Judgment for the Defendant. And at another Day in this Term the Court gave Judgment for the Plaintiff; which was deliver'd by Holt Ch. J. Who said, that the Defendant having submitted to the Process, let it be right or wrong, the Bond which he gives shall be a good Bail-Bond, and shall not be avoided. And if the Goods of a Stranger are in my Custody, and are attached, if I do not contest it, but give a Bail-Bond, their being the Goods of a Stranger shall not avoid the Bail-Bond. Indëed if he had taken it *Colore Officii*, when there was no Process at all, it had been void by the Statute. Powell J. said, a Man cannot avoid his Bond by Durefs to his Goods, but only to his Person: Q. Judgment for the Plaintiff.

Legg vers. Stradwick.

(4.) THE Earl of Bedford, the 2d of Jan. 1692. demised to Anne Horsenell from Lady-Day 1695. for twenty-one Years; which Term by mean Assignments came to Stradwick the Defendant; and he 25 March 1703. demised to Jacob Broom, from the 25th of March unto the full End and Term of one Year, and so *de Anno in annum quamdiu ambobus partibus placuerit*, rendring 40*l.* Rent per Ann. Jacob enjoyed the Term from 21st of March to 17 December, and then died Intestate; and Administration was granted to Legg the Pleaintiff, who entered into the said Land; and because 60*l.* a Year and a Half's Rent was due, he avows taking the Cattle, &c. The Plaintiff in Bar to the Avowry said, he did not demise to Broom, as he has alledged in the Avowry; and on that Issue is joined, and Verdict for the Defendant. And last Term,

Replevin by the Plaintiff, the Defendant avers as follows.

Mr. Whit-

Mr. *Whitacre* moved in Arrest of Judgment, because it was but a Lease for one Year to *Broom*; then *Stradwick's* distraining for one Year and a Half's Rent was ill, because he distrained after the Lease was ended. But this Term the Court gave Judgment for the Avowant, that the Distress was lawful; for *Holt Ch. J.* said, such a Lease as this is not a Lease for two Years, or a Lease at Will, but 'tis a Lease for every particular Year, and yet you may distrain for ten Years Rent, at the End of ten Years; because one Lease springs so out of the other, and out of the same Contract, as that when one Year is ended, there is an End of that Lease, and when the Lessee enters on another Year, 'tis another Lease for a Year, & *sic toties quoties*.

*The Parish of St. Giles in the Fields verſ.
The Parish of Weybridge in Com' Surry.*

A removed by Certificate from B. to C. takes an Apprentice, who serves out his Time at C. and lives two Years, cannot be removed with his Master.

(5.) *Simons*, a Taylor by Trade, an Inhabitant of *St. Giles's* Parish, removes to *Weybridge* in *Surry*, with a Certificate, and there takes an Apprentice, who served out his Time, set up his Trade, and lived two Years in *Weybridge*. But his old Master being become chargeable, the Justices of the Peace made an Order to remove *Simons*, and his said Apprentice, as Part of his Family, to the Parish of *St. Giles*, which Order was moved to be quashed; because the Word (*Family*) must not be taken in so large an Extent. And this Term the Court gave their Resolution that the Order was ill.

Holt Ch. J. said, The Question was, whether this Apprentice ought to be removed with his Master, by the Word *Family* in 8, 9 W. 3. c. 30. The Act says, *That he and his Family, and Children born there, shall be removed, unless they have gained another Settlement there.* Besides, this Apprentice never came with a Certificate; the Statute says, *any that moves himself, he and his Family shall be removed;* that is they that came along with him shall go back, and no other than them and the Children born after; and for them

them there is a special Provision in the Act. *Secondly*, He inhabited two Years after the Apprenticeship, which is another Settlement. Therefore he is well settled at *Weybridge*, and cannot be removed to *St. Giles's*. Whereto *Powell Just. &c.* accorded.

Powis said, It was like the Case of *St. Brides* and the *Savoy*, where a Lodger in the *Savoy* came into *St. Brides* Parish, and rented a Shop in *Fleet-street*, but gained no Settlement there; but takes a Servant or Apprentice, who served his Time with the Lodger; this was adjudged a good Settlement for the Servant or Apprentice, tho' the Lodger or Master himself had never gained one. Because the Service being performed in the Parish of *St. Brides*, it gained the Servant a legal Settlement. And the Notice to be given according to the Statute, does not extend to a Servant or an Apprentice. Note;

Gould J. said, Seeing that he had lived two Years in *Weybridge* after he was out of his Time, he could not be removed; but if the Master had been removed during his Apprenticeship, it had been another Case.

Parish of St. Albans vers. Parish of St. Botolphs Bishops-Gate.

(6.) **A**N Order of two Justices was made to remove a poor Man from *St. Alban's* to the Parish of *St. Botolph*, which says, that upon Complaint being made to them, &c. upon Examination it appears, he is likely to become chargeable; and it appearing that he was bound Apprentice in the Parish of *St. Botolph Bishops-Gate*, and that he there served as long as his Master lived, therefore they adjudge that to be the Place of his last legal Settlement, &c.

Order to remove a Man where he was bound Apprentice, and served as long as his Master lived, ill.

Sir Edward Northey moved to quash this Order, for 'tis altogether uncertain. For 1st, It does not appear that he was bound by Indenture, and if he was not, he does not gain a Settlement. 2^{dly}, It does not appear how long he

G g g

served

served, only that he served as long as his Master lived, which might not be above a Week, (*Ergo*) 'tis uncertain.

Mr. *Raymond* for maintaining the Order said, 'tis a Question if the bare Binding of it self does not make a Settlement, and the forty Days mentioned in the Statute is only as to the Residence. 2^{dly}, The Justices do adjudge *St. Botolph-Bishops-Gate* to be the Place of last legal Settlement, which is enough for them to remove him. But the Court concluded the Place of his last legal Settlement from the Premises which are ill; and says, *Therefore* we do adjudge, &c. and for these Reasons before given by Sir E. *Northey*, they quashed the Order for Uncertainty. And

Holt Ch. J. said, That Notice is to be given when a Man comes into a Parish, but no Notice is necessary in Case of an Apprentice or Servant; and barely binding a Man Apprentice, does not gain a Settlement, unless he serves forty Days. And then he took Exceptions, that by the Act of Parliament, when an Order is made by Corporation Justices, the Appeal must be at the next Quarter-Sessions: But upon reading the Statute it appeared, that the Burrough of *St. Alban* was excepted out of the Act.

Order quashed.

Queen and The Commissioners of the Land-Tax for Barnwell.

Mandamus to tax Lands equally.

(6.) UPON the Motion of Sir *Peter King*, Recorder of London, the Court granted a *Mandamus* to the Commissioners of the *Land-Tax* for *Barnwell*, to tax the Lands there *equally*.

Fowbert vers. Ekins.

New Trial denied.

(7.) SIR *J. Mountague* Attorney General moved for a new Trial in this Cause; because the *Postea* was eaten with Rats. But the Court denied it; for there was

Part

Part of it remained, and particularly the Costs and Damages, written with the Party's own Hand.

Queen vers. Griffith.

(8.) **M**R. Dee moved to quash an Indictment against the Defendant for taking Goods feloniously, which the Prosecutor had as Executrix to J. S.

Indictment of
Felonny quash-
ed.

Curia. It is not said where he took them, nor in what Manner, so that it does not appear he stole them.

Quashed *nisi*.

Hull vers. Holliday.

(9.) **A**N Action brought against a Bankrupt; the Defendant pleads the Statute of Bankrupts, (in which 'tis said, *That the Person who does as the Act directs may plead the General Issue;*) and that he manifestly became a Bankrupt before the Day, &c.

Statute of
Bankrupts
pleaded, ill.

Holt Ch. J. said, this Plea will not do; for when a Statute gives a Plea, it must be pleaded in the Words of the Statute; and besides, by this Pleading, it does not appear the Person was within the Act; for the Debt might be after he became a Bankrupt, and before he became a publick (published) Bankrupt, and then he would be out of the Privilege of the Act. Therefore Judgment for the Plaintiff, *nisi* Cause shewn before the End of the Term.

Grumble vers. Jones in B. R.

(10.) **A** Special Verdict finds, that the Grandfather was seised in Fee, and by Will devises thus: *I give to my Daughter Agnes for Life, Remainder to A. L. and his Heirs; and for Default of such Heirs, Remainders over.* And

Devise in Re-
mainder to A.
and his Heirs,
and for De-
fault over, is
a Fee.

the Question was, if this be an Estate in Fee or in Tail. Holt Ch. J. You will find it a hard Point to make this an Estate-

Vide ante.

Estate-tail. Sir Peter King urged, That it was so; and cited the Case of *Idle and Cook*, *Easter Term 4 Annæ*. If the Remainder had been to his Brother, or to any Body that had been Heir at Law, it would have been a Tail; for then he could not have died without an Heir, and so a Remainder might properly be; or if it had been *de se ex-cunte*, or the like: But these Limitations were never carried further. But the Court gave Judgment, *That this was a Fee*, but made the Rule *Nisi*, &c. Note; The Controversy was between the Heir of the Devisor, and the Heir of the Devisee no Way related to the Devisor.

Reeves vers. Gower, in C. B.

Devise to A.
paying a Sum
to B. within
two Years. A.
has a Fee.

(11.) IN a special Verdict the Case was found thus: A. by his Will devises Lands to B. and then bequeaths Legacies; and after two or three Legacies to different Persons, he gives 5 l. to C. and directs B. to pay it, but gives him two Years Time to pay it. The Jury find the Lands to be 50 s. *per Annum*; and the Question was, what Estate B. had, whether for Life or in Fee? And adjudged *to be a Fee*. For that the Devise here was a Sum in Gross, and a *Debitu' in presenti solvend' in futuro*; and it was a Sum certain to be paid by B. at all Adventures, whether the Land yielded full 5 l. or not; and so not like the Cases, where the Sum devised is to arise out of the Profits, &c.

Prince vers. Clark, in B. R.

Vide ante
Mich. sextæ
Annæ, N. 8.

(12.) THIS Case was now again moved, and agreed, That the Words, if true, would subject him to Ecclesiastical Censure, and thereupon Sir Peter King prayed a Consultation; and cited 3 *Lev.* 71, 18. *Godb.* 446. and 2 *Roll* 297. Mr. Solicitor General argued, That Defamation, to give the Spiritual Court Jurisdiction, must be in respect of the Cause, not of the Person; and therefore there is

no Difference between a Clergyman and a Layman. 4 Co. 20. 2 Inst. 692. And unless it subject him to Ecclesiastical Censure, tho' he be a Clergyman, yet they have no Jurisdiction for such Defamation. Godb. 446. Nor can he have Prejudice by the Words; for when a Parson is admitted by the Ordinary, can he afterwards be deprived for Ignorance? He might be refused for Ignorance, but I never heard of one Parson deprived for it. This Parson was only a Curate, &c.

Powell. But this is his Way of Living, i. e. his Trade; and to say one is ignorant in his Trade is actionable; so to say such an Attorney, &c. is ignorant in his Profession. Powis. Take all the Words together they import a great Scandal. Holt Ch. J. You must make something out for which he is suable in the Spiritual Court. *Et adjournatur.*

(13.) Note; Towards the Conclusion of this Term, Holt Ch. J. declared for Law, That no Action of Trespass *Vi & Armis* would lie for a Tenant at Will against his Landlord, for the Lord's entring or distraining for Rent, &c. and cited *Dyer* 119. 10 E. 4. 7. 2 Inst. 105. and *Mo.* 105. And Note *Finch's Law* li. 3. c. 6. That no Action of Trespass will lie for a Lessee for Years against the Lessor, altho' he distrain without Cause. And see there the Reason. 2. 9 Co. 76. *Yelv.* 148. *Wing's Max.* 1, 703.

H h h

Easter

Easter Term, 1709.

8 *Annae* Reginae in B. R.

Lord Alibam vers. *Lord Anglesea*.

A Fine levied
but no De-
claration of
Uses, and
then a Re-
covery had,
2. if to the
Use of the
Conusor or
Conusee?

(1.) **T**HIS was an Issue directed out of Chancery, to try the Validity of *James* late Earl of *Anglesea's* Will. The Case was this: *James* Lord *Anglesea*, Tenant in Tail of Lands in *Ireland*, levies a Fine, and the next Term following suffers a Common Recovery, wherein the Conusor was made Tenant to the *Pracipe*, and Tenant in Tail came in as Vouchee: It was found, that there was no Deed, or other Writing, between the levying the Fine and suffering the Recovery to lead the Uses of the Fine; but Tenant in Tail, supposing himself seised in Fee by the Recovery, devises the Lands in Question to the Plaintiff.

1. If Deposi-
tions in *Ire-*
land be good
Evidence here.

There were two Points argued, which were saved upon the Trial. 1. As to the Matter of Evidence; whether Depositions taken in *Ireland* by Virtue of a *Dedimus*, certifying that the Papers sent over were true Copies of certain Fines and Recoveries suffered there, and Witnesses swearing that they were the same, and had received no Alteration, &c. be good Evidence. 2. Whether, there being no Deed to lead the Uses, according to the Statute of Frauds and Perjuries, the Use resulted to the Conusor, or went to the Conusee, so as to make a good Tenant to the *Pracipe*.

Sir *Simon Harcourt*, and Sir *Tho. Powis*, for the Defendant argued, That the Evidence was not good; because the best Evidence that can be had must be given; and here they

they might have sent one to have examined these Records, who might have taken Copies of them, and have attested them to be true Copies *viva voce*: And as to the other Point, that the Uses not being declared in Writing, the Fine could not make a Tenant to the *Præcipe*, and so the Recovery was void; for they said, a Fine without Uses declared in Writing, would have no Effect, but it would result to the Conusor in the same Condition it was before the Fine levied, and so not cut off the Intail.

For the Plaintiff it was argued, by Serjeant Hooper, and the Solicitor General, and Mr. Eyre, That the Depositions were good Evidence; for Depositions of one that is sick or cannot come may be read; and all those, through whose Hands these passed, swore they were not altered. As to the second Point, that the Intent was plain, *viz.* only to make a Tenant to the *Præcipe*, in Order to suffer a Common Recovery to cut off the Intail, to the End that *James Lord Anglesea* might dispose of his Estate by Will. That it was a Question, whether Uses were included in the Statute by the Words (*Trusts and Confidences*;) that the Notion that a Use shall result to the Conusor, if it is not declared otherwise in Writing, is grounded on 1 *Inst.* 23. b. But it appears by *Shortbridge* and *Lampen's Case*, *Mich. 1 Anne*, and *Raynolds* and *Blake*, 9 *W.* 3. That if a Fine be levied, it shall not be esteemed of no Effect, but shall go to the Conusee, if nothing appear to the contrary; that a Fine is like a Feoffment, and is a Feoffment of Record; and if a Feoffment be made to *B.* of *Black Acre* (for 1000 *l.*) it will go to *B.* and not result; that Presumptions are to be made for the Benefit of Common Recoveries, being now become Common Assurances.

Upon Arguing of this Case, *Holt Ch. J.* said, That if Tenant in Tail discontinue in Fee, and a *Præcipe* is brought against one who is not Tenant to the *Præcipe*, and Tenant in Tail comes in as Vouchee, whereby he admits the Stranger to be Tenant to the *Præcipe*, this shall estop the Tenant in Tail, and his Heirs general, but not the Issue in Tail; yet Trusts and Uses are Synonymous in the Law, &c. Suppose a Bargain and Sale is made to suffer a Common

mon Recovery, within a Year, and none is suffered, it is to the Use of the Bargainor. But in this Case, where the *Præcipe* is brought against the Conusee, there is a Use arises to him by Operation of Law.

Powell said, He was not so clear as the Lord Ch. J. but said, that a Penny Consideration would prevent the Resulting of the Use, but here was none; upon levying the Fine there was a Use, and where did it vest but in the Conusor, and how came it out of him?

The last Day this Term the Court gave their Opinion *seriatim*.

Evidence.

Gould. There are two Points in Question. 1. Whether the Depositions of one who is out of *England*, where no Process will fetch him, may be read as Evidence to prove the Record? And I hold it may; as also in Case one be sick, &c.

2. As to the Tenant to the *Præcipe*; I hold, that here is a good Tenant to the *Præcipe*; for I do not take it to be within the Statute; if there be a Common Recovery suffered, it must be presum'd that there is a Tenant to the *Præcipe*; and if there be none, it must be avoided by a Writ of Error.

Powis of the same Opinion, as to the first Point, for the same Reason.

3. I hold, that if a Fine be levied to *A.* with Consideration at this Day by a parol Averment of the Money being paid, it will vest the Use in the Conusee, and so I hold it would be, tho' within the Statute; it was certainly so before the Statute, and is so at this Day.

Note.

Besides, they being but one Conveyance, you cannot raise a Construction of Law in the Middle of a Conveyance.

9 Co. 8. a.

Upon the Reason of *Dowman's* Case, the Deed may follow a long Time after the Fine; and in *Dyer* it follows four Years after; and so it may be longer, if there be no Act done in the mean Time declaring the Intent to be otherwise.

Powell. As to the first I would have it brought to a Certainty; It is better to have Witnesses *viva voce*, where they

they may be had. But suppose the Record be out of the Queen's Dominions, or in the *West-Indies*, or in *Scotland*, I take it, that a Deposition would do in such Cases, &c.

As to the second Point, as it is dangerous to avoid such Conveyances, so it is to break into the Statute.

Tho' the Recovery shews the Intent, yet it is not such a Writing as is intended by the Statute; and the Common Law will not distinguish between Trusts and Uses.

Neither the Conusee nor a Stranger can take a Use by a parol Averment. But here I hold that the Conusee did not take by Way of Use, but at Common Law: But here there must be a parol Averment to prevent the resulting of the Use. But such Averment will not be admitted.

The Fine had its Operation immediately before the Recovery, so as here must be a parol Averment, that it was to the Use of the Common Recovery; and this parol Averment, hindring the Resulting of the Use, is out of the Statute; for it is not to raise a Use, but to prevent its resulting.

Holt Cap. Just said, As to the first Point the Law requires the best Evidence that can be had. But we cannot compel any one to come out of *Ireland*; nor oblige any one to go and inform himself, in order to be a Witness: But this Rule is to be interpreted with Respect to the Person deposing; as that a Man's Affidavit shall not be read when he is here to give his Evidence *viva voce*; but when the Person cannot be brought into Court, tho' there be other Witnesses to give Evidence *viva voce*, yet the Depositions *Quart.* of those that are absent may be read; he cited 2 Cro. 541. but said, he would not warrant the Authority of the Case.

To the second Point he said, this was out of the Statute of Frauds and Perjuries. There be two Clauses in the Statute, (the first is, *That all Declarations of Trusts shall be manifested by some Writing, signed by the Party, or by his last Will in Writing, or else be void*; the second is, *That Trusts resulting by Implication of Law, shall be as if this Act had not been made.*) Now I hold, that since the Statute there must be a parol Averment to make the Use result;

for at Common Law, if a Fine was levied, it was to the Use of the Conusee till such Averment.

When Tenant in Tail comes in as Vouchee, he admits the Conusee Tenant to the *Præcipe*; and his Meaning is plain, that he intended to make himself Tenant in Fee; not from the Use that should result from the Conusee, but from that resulting from the Seisin of the Recoveror. *Idco nemine Contradicente*, Judgment for the Plaintiff.

Nota; In this Case Holt also said, that the Statute of Frauds, which enacts, *That the Declaration of Trusts shall be manifested by some Writing signed by the Party*, extends only to the Strangers, and not to the Conusee of the Fine; for there need be no Writing to declare the Use to him, therefore it cannot result without a parol Averment: But when a Fine is levied, and 'tis to the Use of a Stranger, then it is within the Statute, and must be declared in Writing.

Queen vers. Vicars of Doncaster.

*Mandamus to
restore a Ca-
pital Burgefs.*

(2.) *A Mandamus* to the Corporation of Doncaster, to restore — *Vicars* to be a Capital Burgefs; to which they return, that the Corporation have Time out of Mind had a Toll for Coals, viz. for every Wain Load going through the Town a Coal, of the Value of one Penny; for every Cart-load a Coal to the Value of a Half-penny; and for every Horse-load a Coal as big as a Piece of Wood, (kept Time out of Mind by the Corporation): That the said *Vicars* did, contrary to his Oath, hinder the Gathering of this Toll, as well by Menaces to the Toll-Takers, as by Perswading the Owners of the Coals not to pay Toll, and telling them, that he would uphold them in their Refusal.

After several Arguments, the Court was of Opinion, that it was not sufficient Cause to turn him out. For *Powell* Just. said, it was no more than saying the Toll was unreasonable, when it appears so to be to the Court, and also uncertain. *Idco* a peremptory *Mandamus* was granted.

Queen

Queen vers. Jennings.

(3.) **I**ndictment for refusing to take upon him the Office of High Constable for the Hundred of Farnham, *licet debito & legali modo electus fuit, &c.* To which the Defendant pleads Not guilty, and the Jury find a special Verdict, That the Defendant Jennings was at a Court, held for the Manor of the Hundred of Farnham, 16 Sept. anno sexto Annæ Regine, debito modo electus Chief Constable for the Hundred of Farnham; and they find, that he being so elected, did refuse, &c. They find farther, that within the Manor of the said Hundred of Farnham, there are several other Manors belonging to divers Lords, the Inhabitants whereof used to be elected for the said Hundred; they find also, that there is the Manor of the Town of Farnham, within the Manor of the said Hundred, in which there is a Court-Leet; and that the Defendant is an Inhabitant within the said Town of Farnham, and non alibi; and that no Inhabitant of the Town of Farnham ever served as High Constable for the Hundred of Farnham.

Indictment for refusing the Office of a High Constable. *Vide post. Trin. N. 1.*

The Question arising upon the special Verdict was, whether the Defendant being in a particular Leet, is excused from serving as High Constable of the Hundred? And on Debate, the Court held, *That he is not excused.* Holt Ch. J. said, that High Constables are Officers at Common Law; and that the Statute of Ed. 3. did not give them an additional Authority; and that if a Hundred have not a Leet, the High Constable must be chose at the Sheriff's Tourn, yet his Power would be restrained to the particular Hundred; and I do not know that the Statute of Winchester makes such an Alteration as will exempt him; he said likewise, that in a private Leet the Lord may sit as Judge, and exclude the Steward. (*Quære*, if so in a publick Leet.)

King v. King, 3 Keb. 197.

The Court gave Judgment for the Queen, upon the Special Verdict. But Exceptions being taken to the Indictment, it was put off to Trin. Term next. *Vide post.*

Smith

Smith vers. Bowen.

Appeal of
Murder after
a Pardon.
Vide post.
Term Trin.

(4.) THE Defendant *Bowen* was indicted at the *Old Bailey* for the Murder of one *Smith*, and found guilty, but obtained the Queen's Pardon; the Appellant, an Infant, as Brother and Heir to the Deceased, lodges an Appeal in *propria Persona* against the said *Bowen*, before the Justices of Oyer and Terminer and Gaol-Delivery, the same Sessions at the *Old Bailey*, which being removed by *Certiorari* in B. R.

Sir *Tho. Parker* for the Appellant moved, that he might be admitted *per Guardianum* in B. R. which the Court refused, as too late, for it ought to have been commenced by Guardian at first, and then they should have moved to have had him admitted by his Guardian in B. R. The Court said, that if the Defendant pleaded this in Abatement, the Appellant might confess his Plea, and commence a new Appeal by Bill; for a *Nonsuit* is peremptory; but an *Abatement* is not.

Afterwards the Appellee being brought to the Bar, and the Appellant being in Court, his Counsel would have abated the Writ, and brought a new Appeal by Bill. But the Court would not let them. And *Holt* said, that this is not like the Case of *Watts and Brains*, 3 Co. Entries; for there the Writ was void. At another Day, the Appellee being brought to the Bar, the Appellee's Counsel refusing to plead the Infancy in Abatement, designing to take

Appeal abated
per Cur. ex
Officio.

Advantage of it after Trial, the Court said, that since they would not plead the Infancy in Abatement, the Court would abate the first Appeal *ex Officio*; and ordered it to be entered, that the said Appellant being in Court, and it appearing, by Inspection of the Appellant, that he was under Age, * *Ideo* the Court *ex Officio* does abate the Appeal. And *Holt* said, that if the Appellant had not been in Court, then there must have been a Writ to have brought him into Court, to inspect him. Hereupon the Appellant brought another Appeal by Bill, and declared against him

* N. B. He
was not above
six or seven
Years old.

in

in *Custodia Mareſcalli*, and the Appellee being arraigned *inſtanter*, demurred to the Appeal, and pleaded Not guilty. The Court ordered the Abatement of the first Appeal to be entered as the first Day of the Term; and that the Pleading to the second should be entered *inſtanter*, that the Demurrer might be first determined; and for that End made it a *Conſilium* to be argued in *Trin.* Term next. *Vide ibid.*

The Appellee prayed to be admitted to Bail; which the Court said, they could do on Issue joined, Demurrer, or *Cur' adviſare vult*, if he could find four sufficient Bail, who would be bound Body for Body. But those he offer'd not being approved of, he was remanded to the *Marſhalſea*. *Vide poſt.*

Young verſ. Slaughterford.

(5.) THE Defendant *Slaughterford* was indicted at *Kingſton* Affiſes, for the Murder of *Jane Young*; and the Jury there acquitting him againſt Evidence, *Holt Ch. J.* who tried him, remanded him, and ordered an Appeal to be brought againſt him, and the Appellee being brought up by *Habeas Corpus*, and committed to the *Marſhalſea*, an Appeal was accordingly brought; and being brought to the Bar, and arraigned in *French*, he pleaded in Abatement, that the Vill in which he was commorant was *Shauford*, *abſque hoc* that it was *Shalford*.

Appeal of Murder after Acquittal, directed by *Holt*.
2. Si juſte?
Vide poſt.
Term *Trin.*

Mr. *Raymond* for the Appellant ſaid, that the Appellee's Plea was not to be received without an *Affidavit*, ſince the Act for Amendment of the Law, it being a dilatory Plea; at firſt the Court inclined that the Plea could not be received without an *Affidavit*, Criminal Cauſes not being excepted out of the Act, (the Exception of Appeals in the Act relating only to the preceding Clause): But the Appellee being brought the next Day, the Court was of Opinion, that the Plea might be read without an *Affidavit*, becauſe tho' this Plea for the moſt part is dilatory, yet it is not in this Caſe, for the Appellee muſt plead over, and

K k k

Issue

Issue joined on that as well as upon Not guilty, and both may be tried at the same Time; and accordingly the Plea was received, and read in French by his Counsel, and the Appellant's Counsel *instanter* joined Issue in French, to which the Appellee's Counsel said (*Semblement*.) The Court ordered, that a *Ventre* should be issued out, bearing *Teste* the 1st Day of Term, and the Appellee should be tried at the Bar; upon which the Appellee was remanded to the Custody of the Marshal, because none would be bound Body for Body for him; the Court said, there must be four Bail in an Appeal of Murder.

Note; Holt Ch. J. ordered, that his Irons should be taken off when he was brought into Court.

Sawyer vers. Mawgridge.

*Double Plea
by the late
Act 4, 5 Ann.*

(6.) DEBT upon a Bond, the Defendant, according to the late Act, pleads two Pleas, *viz. Non est factum*, and that he had satisfied himself by Sale. Issue thereupon, and Verdict for the Plaintiff, and for the Defendant it was moved in Arrest of Judgment: Upon Oyer of the (Bond) or Note, it was in these Words, *These are to authorize you J. S. to sell so many of my Goods as come to 9^l. to pay my Debts, which I do hereby acknowledge to owe to you, &c.*

Holt and Powell held, that the Action lay for those Words, for the Word *Oblige* is not necessary to make a Bond; for if one under Hand and Seal acknowledge himself *indebted*, 'tis enough to bind him.

Powis held, that the Words *I do hereby acknowledge to, &c.* were by Way of Parenthesis, which Holt opposed.

Judgment for the Plaintiff.

Authors cited for the Plaintiff. *Dyer* 21--226. *Kelway* 34. b. 1 *Vent.* 238. *pro Def.*, 1 *Vent.* 42,--339.

Roberts

Roberts vers. Morgan.

(8.) **T**respas for going over the Plaintiff's Close with Horses, Cows and Sheep; the Defendant justifies, that he has a Way for Horses, Cows and Sheep, and says, that such a Day he went over with Horses; and upon Demurrer it was adjudged ill; for it is a Justification only for Horses. *Judgment for the Plaintiff.* Sed quare.

In Trespass, Justification for Horses, Cows, &c. not good for Horses only.

Nelson vers. Collins.

(8.) **A** Writ of Error out of the Common Pleas; the Error assigned was, that in the Declaration it was *Collins per — Busby Attornatum suum*, without any Christian Name.

Error on a Blank Declaration, yet Judgment affirmed.

Holt Ch. J. said, that he remember'd a Case, where it was assigned for Error, that the Attorney, by whom the Party appeared, was no Attorney of that Court. But it was disallowed for Error; and that is not the Merits of the Cause, and may be helped by the late Act, it being after Verdict. *Judgment affirmed.*

Harrington vers. Busb.

(9.) **A**ction of Trespass for taking Cattle, the Defendant pleads, *quod Possessionatus fuit* of the Close; and that he took them Damage-feasant.

In Trespass for taking Cattle, Defendant pleads *Possessionatus*, held good *sans* shewing his Title.]

The Question was, whether in this Case *Possessionatus fuit* was sufficient? Or, whether the Defendant should have set forth his Title?

For the Plaintiff was cited *Pell vers. Garlick*, 2 Lutw. 1492.

Powell

Ant. *Powell J.* said, That if the Title cannot come in Question, *Possessionatus fuit* was sufficient. But perhaps in this Case the Title may come in Question; and cited *Yelverton, Foldar* vers. *Ridge*, and *Cro. Jac. Purefoin* vers. *Genis.*

Holt Ch. J. said, that he thought the Title could not come in Question; for the Action is brought only for taking his Cattle; if he had claimed the Land, the Action should have been for Entering the Land; but where the Trespass is only for a personal Act, as Beating or taking Cattle, *Possessionatus* is sufficient.

If *A.* is possess'd, and *B.* comes and treads down his Corn, and *A.* *molliter manus imposuit*, to put *B.* out of his Corn, for which *B.* brings Assault and Battery, *A.* may plead *quod Possessionatus fuit, &c.* and that he *molliter manus imposuit* to put *C.* out of his Corn, and it is good, without setting forth a Title. He said, this was like the principal Case, for the Action is transitory, and cannot be made local but by a *Clausum fregit*: Indeed in an Avowry, a Title must be shewn, but that is not like this Case. *Powis* and *Gould* of the same Opinion. And Judgment for the Defendant

Title to be
shewn in A-
vowry.

Anonymus.

Words, of a (11.) *A*ction upon the Case for Words spoke of one who
Collector of a went about the Country to collect Charity for a
Charity. Loss by Fire; the Words were, *He fired his House*, (*innuendo* voluntarily) *He was brought up to rook and cheat the Country, and since he has fired his House he has cheated it more and more; per quod* he lost much Charity, which otherwise he would have had; after Trial, and Verdict for the Plaintiff, it was moved in Arrest of Judgment, by *Mr. Page*, That the Action did not lie.

And the Court was of the same Opinion. For the (*Innuendo*) did not supply the Place of *Voluntarily*, which must be proved to make him criminal; and suppose it had been said voluntarily, yet the Action would not lie;
for

for it is not Felony, unless it be with Intent to fire his Neighbour's House; and tho' the Words are taken in *malam partem*, yet they are not actionable.

Also Powell said, It was unlawful for People to go about the Country and collect Charity, unless they have Letters Patents. And per Holt Ch. J. To say a Man is an *errant Knave, Rogue, or Rascal*, is not actionable. *Judgment arrested.*

Kid vers. Dr. Watkinson.

(12.) **A** *Mandamus* was granted to restore a Parish Clerk, *Mandamus for a Parish Clerk.* he being elected by the Parishioners, and displaced by the Parson.

Tutty vers. Alewin.

(13.) **A**ction on the Case for Words was brought by an Apothecary; the Words were, *It is a World of Blood he has to answer for in this Town, through his Ignorance, he did kill a Woman and two Children at Southampton; he did kill John Prior at Petersfield, (and in another Place the Defendant said, he was the Death of John Prior); he has killed his Patient with Physick; ubi revera, they died of the Visitation of God,* adjudged that the Action lies. Words of an Apothecary.

Books cited were Gro. Eliz. 620. 2 Anderson 268. Sutor and Emert, 2 Roll Rep. Cro. Jac. 206. Hetley 69. 1 Cro. 270. Sir Tho. Jones 141.

Anonymus.

(14.) **S**erjeant *Banister* moved for a Prohibition to the Spiritual Court, to prohibit them proving a Will made by a Feme Covert, without her Husband's Consent. Prohibition against proving a Will. Holt said, A Feme Covert cannot devise what she has as Executrix without the Husband's Consent. And the Motion was granted *nisi* this Term, and made absolute in Trim. Term following.

Queen vers. Grantham.

Indictment for
Cheating by
a false Pre-
tence, lies
not. 2.

(15.) **M**R. Dee moved in Arrest of Judgment, upon an Indictment against the Defendant for coming in the Name of Jones and borrowing Money, and promised that Jones would repay it; *ubi revera*, Jones never sent her, of which she was found guilty.

He said, that an Indictment would not lie, for she brought no Tokens with her.

Mr. Bains cited the Case of the *Queen vers. Jones, Hill.* 2d of the Queen, which was exactly the same Case, and the Indictment was quashed, tho' there was a Token brought.

Holt C. J. said, he remembered a Case 1 *Lev.* 169. 1 *Sid.* 258. where a lusty Fellow came to a Shop to buy Goods, and upon his Affirming that he was of Age, the Shop-keeper trusted him; after, upon his refusing to pay for the Goods, the Shop-keeper brought an *Indeb. Assump.* to which he pleaded that he was not of Age; upon that, the Shop-keeper brought an Action on the Case for the Deceit, and upon Motion in Arrest of Judgment, it was adjudged, that the Action did well lie, for else Non-age would have a Privilege of Cheating; But if an Action will not lie for the Fraud, certainly an Indictment will not lie. 2.

The Court offered, that it might be spoke to again. But Mr. Raymond, who was for the Queen, seemed satisfied that the Indictment did not lie; he said, he remember'd the Case cited by Mr. Bains.

Queen vers. Inhabitants of Puttenham.

Poor's Provi-
sion, Justices
cannot order,
but on Com-
plaint of O-
verseers.

(16.) **A** Motion was made to quash an Order of Sessions; the Exception taken was, That it did not appear that there was any Complaint of the Overseers, only *A. B. &c. quorum unus*, do Order, &c.

Per

Per Cur', The Justices have no Power but upon Complaint of the Overseers, for which Reason the Order was quashed. Also the like Order of Sessions *Inter the Queen and Inhabitants of Crediton* was also quashed, for the same Reason.

Anonymus.

(17.) **A.** And B. being joint Merchants, have Goods jointly between them, A. delivers the whole to C. in Trust for his Executors, and dies, and C. delivers them to the Executors accordingly; B. as Survivor brings Trover against C. The Court held, that there is no Survivor in Merchandize, but an Account given by the Statute; and C. having performed his Trust is discharged, so that the Action should be brought against the Executor.

No Survivorship between Joint Merchants.

Buston vers. Ridley.

(18.) **I**N Ejectment, R. Bradbourn being seised in Fee, in 1658. enters into a Recognizance before J. Glynn, then Ch. J. of the Common Pleas. Then a Recital of the Process out of Chancery upon the Statute of H. 8. and an Extent out of Chancery thereupon. Two Administrations were granted, one out of Durham, the other out of London. Sir Edward Northey urged, There was no such Recognizance; for J. Glynn (he said) never was Chief Justice.

Recognizance a Record, &c.

Per Cur', Where a Man has *Bona Notabilia* in two Provinces, there must be a double Administration. But where a Man has *Bona Notabilia* in one Province, and Goods only in one Diocese in another Province, there the (Archbishop's) Prerogative takes Place. (*Quere*, of Goods only in one Diocese in the same Province?) And so if there be not *Bona Notabilia* in both Provinces, the Archbishop of the Province, where the *Bona Notab'* are, shall grant the Administration. See 3 Cro. 305. A Recognizance is a Record

Administration where *Bona Notabilia*, &c.

but

but inferior to a Judgment. (*Note, Holt Ch. J. called it a Pocket-Record.*)

Serjeant *Cheshire*. *Non Constat* that this Recognizance was ever enrolled, and that 'twas only ambulatory; and then the Person that intitles himself to it must take out Administration where 'twas found; but a Record in one Place is a Record in all, &c. and they have not shewed where this Recognizance was found. And because it was acknowledged, it is not therefore necessarily to be presumed that it was enrolled: For tho' there is an Officer appointed to enroll it, yet he may have neglected doing it, and for such Neglect a Penalty is appointed (by the Statute).

Recognizance
a Record
where taken,
and local.

Holt Ch. J. The Statute, *i. e.* the Recognizance, is ambulatory, and is not certified into the Chancery till the Ex-tent. *Powell J.* If it appears to be taken at a Judge's Chamber in *Fleet-street*, &c. it makes it local. *Quod fuit concessum*. And yet he held it to be a Record, upon the Taking of it, before the Inrollment; and said, that the Enrollment was by a Statute in Queen *Elizabeth's* Time. And the Court seemed to agree, that 'tis a Record where 'tis taken, and so local. *Sed adjournatur.*

At the Sittings at Guild-hall, before

Holt Ch. J.

Anonymous.

Evidence.
The Wife in
an Assault on
herself.

(19.) **I**N an Action of Assault and Battery brought by the Husband against the Defendant for an Intent to ravish his Wife, she was admitted an Evidence, (which *Holt* said, it was because the Wife cannot give any Consent, tho' it be not Felony): *Holt* held, that *A.* having laid 5*l.* of the Event of the Cause, was no Objection to the Wife of *A.* being admitted to be an Evidence, because it shall not be in the Power of a third Person to disqualify one, who otherwise would be a good Evidence; and thereupon she was admitted to give Evidence.

And

1

At

At the Sittings at Westminster, before
Holt Ch. J.

Brown vers. The Corporation of London.

(20.) UPON Issue joined upon a Prescription for a Toll, the Defendant produced a Witness; the Plaintiff objected, that he was a Freeman and so interested; upon which the Defendants produce a Judgment in the Mayor's Court, where upon a *Scire facias* awarded, and two *Nihil* returned, they had given Judgment of his Disfranchisement: But upon Inquiry, the Man said, he never was summoned, and knew nothing of his Disfranchisement; therefore the Proceeding being irregular, Holt would not admit the Man to be an Evidence, because the Judgment in the Mayor's Court may be avoided.

Evidence of
one irregu-
larly disfran-
chised, refused

In this Case it was likewise said *per Holt*, That a Man who uses a Way may be an Evidence whether a Toll has been paid; and so in Case of a Nuisance; but if he contributes any Thing towards the Carrying on of the Suit, he cannot be an Evidence.

Evidence of
Toll by the
Payer.

Anonymus.

(21.) ACTION of Debt upon a Bond against an Executor, who pleads *plene Administravit*; the Plaintiff's Counsel gave into Court the Inventory taken in the Spiritual Court, and put it upon the Defendant to discharge himself.

Evidence, In-
ventory, dis-
perate Debts.

Holt said, that where in the Inventory it was set down desperate Debts, those shall not be Assets, unless the Plaintiff can prove that the Defendant has received them. But those Debts which are not set down desperate, whether Arrears of Rent, or any other, shall be accounted Assets, whether paid or not.

At the Sittings at Guild-hall, holden
before Holt Cap^t Just^s.

Garnet vers. Clarke.

(22.) **A** *Sumptis* upon a promissory Note, whereby the Defendant promised to pay so much upon Account of his Mother; and it being objected, that there was no Consideration to it. *Holt* said, that to promise to pay to J. S. is good; but to promise to pay to J. S. upon Account of J. N. is not good, for that is not within the Words or Meaning of the Act; the Consideration implied in the Act is, that when the Party promises upon his own Account, it must be presumed he is indebted, or else he would not promise to pay it; *aliter* where the Promise is to pay upon Account of a third Person.

In this Case *Holt* directed a Verdict for the Plaintiff, but under Controul, and ordered the *Posse* to be staid.

Mason vers. Hogsdon.

A Factor may be Evidence. (23.) **H**OLT said, That barely being a Factor does not incapacitate a Man for being an Evidence in a Cause; otherwise if he be interested.

A who pleads *non est* in the Plaintiff's Cause; the Plaintiff's Counsel gave into Court the Inventory taken in the Court, and put it upon the Defendant to discharge it. *Holt* said, that where in the Inventory it is said, that the Defendant has received them, unless the Plaintiff can prove that the Defendant has received them, those Debts which are not set down *debentur*, whether in Rent or any other, shall be accounted *Debts*. *Trim.*

Trin. Term, 1709.

8 Anna Regina in B.R.

Queen vers. Jennings.

Holt Ch. J.
Powell, Powell
and Gould.

(1.) **T**HIS Term Mr. Raymond moved to quash an Indictment against the Defendant, for refusing to take upon him the Office of a High Constable, *licet debito & legali modo electus*, (not saying to what,) at a Court-Leet held for the Hundred of Farnham, 16 Sept.

Indictment for refusing to take the Office of High Constable, tho' elected. *Vide ante* Easter Term, N. 3.

The Exceptions he took were, 1. That it was not said to what he was elected, only *licet debito & legali modo electus, &c. sed non allocatur*. For *per Cur'*, It shall be presumed that it was a High Constable.

2. It is said, *Electus fuit* at a Court-Leet held 16 Sept. Now *Magna Charta, c. 5.* enacts, That all Leets shall not be held *nisi bis in anno*, once within a Month after Easter, and the other within a Month after Michaelmas, and this Court is said to be held 16 Sept. and they have not laid any Prescription to hold it at that Time, contrary to the Statute. 3 *Keb. 192, 230, 255. R. v. Barnard, 8 W. 3.*

Deekin's Case, 2 Saund. Sir Edward Northey said, That so it was in the Case of the *R. v. King*, but there the Court held the Indictment good notwithstanding. To which Raymond answered, that the Reason of that Case was, because by the Pleading over they had admitted it, but here we have pleaded Not guilty. To which Holt Ch. J. said, that an Admittance, by Pleading to an Indictment, does not make the Indictment good, as it would a Declaration.

Admittance, by Pleading to an Indictment does not make an Indictment good.

Sir

One may pre-
scribe to hold
a Leet at an-
other Time
than a Month
after *Easter*
and *Michael-*
mas.

Sir *Edward Northey* likewise said, that one may pre-
scribe to hold a Court-Leet at another Time than is
named in *Magna Charta*; and it shall be presumed that
this was so. To which *Holt Ch. J.* and the Court answer-
ed, that indeed one may prescribe so, but unless that Pre-
scription appear, it shall not be presumed. Also, when a
Presentment in a Leet is removed by *Certiorari*, the Stile
of the Court must be set out exactly, but there needs
no such Nicety in Pleading. 2 *Cro. 43. King v. Hill*; And
the Indictment was quashed.

Vide ante.

Young vers. Slaughterford.

Appeal of
Murder.]
Being upon
the Grand
Jury who
found the Bill,
is good Cause
of Challenge
for a Jury-
man upon
an Appeal.
So being of
the Coroner's
Inquest.

Being Uncle to
the Appellee,
good Cause of
Challenge for
the Appellant.

One under 12
may be Evi-
dence, if he
knows the
Danger of an
Oath.

A Witness ha-
ving taken
Money, does
not incapaci-
tate him from
giving his E-
vidence; but
the Jury may
give less Cre-
dit to his E-
vidence.

Otherwise if
he take Mo-
ney upon the
Event of the
Cause.

(2.) AT a Trial at Bar in an Appeal of Murder; in
this Cause *Holt Ch. J.* said, to which the rest
did not dissent, that it was a good Cause of Challenge by
the Appellee, to one of the Jury, that he was one of the
Grand Jury who found the Bill against the Appellee, up-
on which he was indicted at *Kingston Affises*. Also that
the being of the Coroner's Inquest, is good Cause of Chal-
lenge by the Appellee. Also being Uncle to the Appellee, good Cause of Chal-
lenge by the Appellant. But the Appellee denying him to
be any Relation, the Court directed it to be tried on a
voir dire. One being produced to be an Evidence against the Ap-
pellee, who was under twelve Years of Age, and the Ap-
pellee's Counsel objecting to him for that Reason; and be-
sides, they said he had taken Money.

Holt Ch. J. said, that if he knew the Danger of an
Oath, he might be an Evidence; (and that appearing, he
was admitted). And suppose he had taken Money, that is
no Reason why his Evidence shall not be taken: But if it
be proved, the Jury may give the less Credit to his Evi-
dence. But suppose one gives or promises a Witness Money if
the Cause go on that Side, he cannot be admitted to give
Evidence.

Sir Peter King objected, that in an Indictment Evidence of Discourse preceding the Fact, is not to be given.

But Holt said, that they might give in Evidence any Thing that explains the Fact.

The Appeller being found guilty of the Murder, came afterwards to receive the Judgment of the Court; and being arraigned, and asked what he had to say why Judgment should not be given: Motion in Arrest of Judgment, on an Appeal of Murder.

Mr. Eyre, Solicitor General, moved in Arrest of Judgment, that the Appeal was not good; and took his Exceptions to it.

1. That there are two Places mentioned in the Appeal, viz. That he was commorant at Shalford, and that the Fact was done at Compton; afterwards it says, *die, anno, hora & loco præd' eandem Jane Young percussit.*

2. There is no Venue laid to the Assault; for it is said, that the Deceased being at Compton, &c. *venit præd' Christop' Slaughterford felonice, voluntarie & ex malitia sua præcogitata ut felo dictæ Domina Regine nunc, ac contra Pacem, &c. die & hora præd' apud Compton præd' in Com' Surrie, Vi & Armis, &c. ac in & super eandem Jane Young, in pace Dei & dictæ Domina Regine ut præfertur existen' felonice, voluntarie & ex malitia sua præcogitata insultum fecit;* so that the Venue is only laid to the *Venit vi & armis*, for the *ac* separates the Sentence; and if an Assault be necessary, it is necessary to lay a Venue, for it is traversable; it should have been *tunc & ibidem insultum fecit.*

At first Holt Cap' Just', Powis and Gould Justices, were clear, that neither Exception was good, but Powell doubted; and the Matter being put off to the next Day,

Holt Cap' Just', was of Opinion, that neither Exception was material; as to the first, when one Place is the Man's Addition, the other the Fact, certainly *Die, hora & loco præd'* shall refer to the Place of the Fact; and it is as well as if it had been *Eodem*, for the Place of the Fact is the last before the *præd'*. No Need of an Assault to be laid, if there is *percussit*, for that implies an Assault.

As to the other Exception, it is not material, for the Assault is not necessary, for *percussit* is a sufficient Assault; as to Long's Case, where *percussit* was omitted, that was

shewing the Consequence without the Cause; *percussit* implies an Assault, but if it did not, here it is said, *Venit vi & armis* to Compton, *ac insultum fecit, &c. ac cum quodam Baculo, &c. percussit, dans eidem J. Y. unum mortale vulnus, de quo quidem vulnere instanter obiit*, so that if the Assault was necessary in the *Venue* here it would be sufficiently set forth.

Powell said, as to the first Exception, the Precedents are *die, hora & loco præd.* But in an Appeal there needs no Addition, for it is not within the Stat. of Additions; and it being said *apud Compton instanter obiit*, ties down the Stroke to the Place of the Death.

As to the second he said, that *dedit mortale vulnus* would be bad. But in this Case, there cannot be a Stroke without an Assault.

The old Precedents are *insidiando & ex insultu*. But upon the Petition of the Clergy, because it took away the Benefit of the Clergy, in H. 6. Time it was left out, and afterwards it was only *ex insultu*. In *Burgh* and *Holdcroft's* Case, there is no Assault laid, and indeed where there is *percussit*, as in this Case, there needs none.

Powis and Gould the same.

Variance between the *Venire* and *Distringas*.

Then Sir Peter King said, there was a Variance between the *Venire* and *Distringas* for the Addition of one of the Jury is *de Chiddington*, and *Chedington* in the *Distringas*; and he said it was like *Palus* for *Paulus*, or *Constantanus* for *Constantinus*: But it appearing that that Man was challenged by the Appellee, the Court disallowed the Exception; and Judgment was given *quod suspendetur per Collum*; and Powell gave the Sentence: And the Court ordered a Rule to the Sheriff of Surry to receive the Body.

Smith vers. Bowen.

Appeal of Murder. Amendment of the Appeal. 2.

(3.) THE Appellee *Bowen* having demurred to the Appeal Mr. Pongelly took Exceptions to it.
1. That the Murder is laid to be done *post meridiem circa decimam Horam ejusdem Diei*; and if the Murder be in

in the Night, by the Statute of *Gloucester*, cap. 9. it must be pleaded in *Nocte ejusdem diei*; and tho' in *July* it be not dark at ten, yet it must be so pleaded. To which it was answered by

Holt Ch. J. That in Murder this is sufficient; but in an Indictment for Burglary, it would have been bad; for there it must be said in *Nocte, &c.* because it is not Burglary unless it be in the Night.

2. It does not say, the Assault was *vi & armis*, only *venit vi & armis & insultum fecit*; and cited *Wilson* vers. *Laws*, 4 *Mod.*

3. There is no Place set forth where the Stroke was given; for it is said *die & loco prædicti insultum fecit*; now before it is mention'd where the Pledges lived, and afterwards where *venit vi & armis*; now *prædicti* may refer to the Place afore-mentioned, viz. where the Pledges lived; so that there is no *Venue* laid to the Assault.

4. In the Appeal it is *Murdum* for *Murdrum*, and *Georius* for *Georgius*. But upon Examination of the Bill that was filed, it was right. Then the Appellant's Counsel moved, that the Roll might be amended by the Bill, which the Appellee's Counsel opposed, and said, that none of the Statutes for Amendments extend to Appeals; and cited *Tuchin's Case*, and *Hoyl* vers. *Pitt*. See 6 *Mod.* 164, 268.

As to the above Exceptions; Holt said, that the *Vi & Armis* shall extend to all, and not only to the *Venit*. *Vide Co. Ent.* 59. And this is not like the Case of Battery or Trespass, for there there is a Fine due to the Queen.

As to the 3d Exception, that *prædicti* is good, for the Place mentioned where the Pledges live, is not Part of the Appeal.

As to the fourth Exception, that he thought there needed no Amendment; but if there does, it may be amended. Suppose in an Action of Trespass, there is an Omission of *vi & armis* in the Narr', and the Original is right, the Declaration may be amended by it. But as to the Mistake of *Georius* for *Georgius*, it is in the fresh Suit, which since the Statute of *Gloucester*, need not be set forth; for if an Appeal be prosecuted within a Year and a Day, 'tis sufficient.

cient. But he said there was a Mistake in Awarding the *Venire*; for it is by *Cesset processus*, but he thought the right Way was *per vicecomes non misit breve*. As to the Amendment, Powell said, that by the Common Law the Roll might be amended by the Bill, and cited 7 *H. 4.* 27. and *Brook tit. Amendment* 101. where an Appeal was amended. But the Original in Appeal is not amendable. 8 *Co.* 156.

Powis and *Gould* of the same Opinion. But upon the Objection started by *Holt*, the Matter was put off to the next Day.

When Mr. *Pengelly* for the Appellee argued, that in this Case there was a Discontinuance of the Issue; for it is entered *quoad Triand exitum præd' cesset processus, &c.* whereas the *Venire* should have been continued by a *Vicecomes non misit Breve*.

Mr. *Whitacre cont.* said, it was held well in the Case of *Armstrong* *vers. Lisle*; to which Mr. *Raymond* answered, that in that Case there was Judgment for the Defendant before Demurrer, so that a *Cesset exitum* was sufficient.

Mr. *Eyre* said, that this was a Discontinuance; for here is a *Dies datus* to the Demurrer, and a *Cesset processus* to the Issue, until the Demurrer be determined; and the Precedents are otherwise, and cited *Rast.* 341, 555, 667. *Co. Ent.* 141, 476, 493, 59. *Rast.* 49. *Egerton* *vers. Morton*, 1 *Bulstrode* 69.

Lutwyche cont. said, that an Appeal differed from a Civil Action; for here one may demur to the whole, and likewise take Issue to the whole; but not in a Civil Action, and all the Precedents cited are of Civil Actions. But in the Case of an Appeal, where there are two Pleas to the whole, 'tis better with a *Cesset processus* to the *Venire*, because there will be no Need of a *Venire*, if the Demurrer be adjudged for the Defendant; but 'tis good either Way; and in *Co. Ent.* 59. *Bulstrode* 69. 'tis adjudged in Point.

Mr. *Eyre* Solicitor General replied, that in those Cases there was Judgment for the Defendant. To which *Holt* answered, that tho' there was Judgment for the Defendant in those Cases, yet the Entry of a *Cesset processus* was not the Cause of it, for if there was a Discontinuance, the

Court

Court could have given no Judgment at all. If a *Quare Impedit* be brought against three, two plead in Abatement; and the other in Bar, and Judgment is given for the Plaintiff as to the two; then it must be entered, but there must be a *Cesset executio*; and if Judgment be given for the third Defendant, and a Verdict for the Plaintiff, then the *Cesset executio* will be continued as to the other two.

The Court gave their Opinion as follows:

Holt Ch. J. said, that upon Consideration, they were of Opinion, that this is the most proper Way; for it is in Vain to proceed to Issue, until the Demurrer be determined; for if the Bill abate there is an End.

As to the Amending the Appeal by the original Bill, it is amendable at Common Law; but if not, yet 'tis by 14 <sup>1. Appeal where amend-
able.</sup> Ed. 3. c. 6. and cited * *Blackmoor's Case*; for Appeals are ^{8 Co. 156.} not excepted out of that Statute

It was doubted, whether a Plea might be amended after Judgment upon Error; and that was upon the Word *Process*, which was thought did not extend to any Plea after Judgment upon Error; to amend which the Stat. 9 H. 5. c. 4. was made, which it did by adding the Word *Record*, and the Stat. 4 H. 6. c. 3. made that perpetual. In none of which Statutes Appeals are excepted; the Stat. 8 H. 6. enlarges the Power of the Judges; but in this Appeals are excepted; he cited the Case of *Sir H. Tuston* ver. *Sir John Asbly*, Cro. Car. 144. An Amendment in a *Quo Warranto*, and concluded, that it should be amended; for the afore-said Statutes extend to Appeals, where by the Record it self it appears to be a Mistake of the Clerk.

Powell said, there were very few Things that were amendable at Common Law; a Misprision of a Clerk was not, if there was nothing to amend it by; but this is amending one Part of the Roll by the other, viz. the Recital by the Bill; in this Case the Bill is *verbatim* the same as the Count; but in most Cases it is otherwise.

As to the Statutes, I see no Reason why an Appeal, which is a Civil Process, is not within them, where it is not excepted. But I ground my Opinion upon the Common Law.

As to the Discontinuance, I think one Way is as good as the other ; without the Order of the Court, it would be a Discontinuance. But we have Power to stay the Issue until after the Demurrer; and this appears to be so by the Entry, *viz. cesset processus quousq; eadem materia in Lege aliquo legitimo modo terminetur*; and that this Way is usual as well as the other, the Precedents cited shew.

Powis and Gould idem pro Eadem Ratione.

And the Court ordered, that the Roll should be amended.

Mascal verf. Davys.

Motion on the inlifting Act, to be discharged out of Execution, denied. *Vide post.*

(4.) **A** Motion was made to discharge one who was a Prisoner, upon the Act of Parliament for Lifting: The Case was, There was a Trial, and after Verdict for the Plaintiff, the Defendant lifted himself; and *Hucks's* Case last Term was cited, where one was discharged upon an *Excommunicato Capiendo*, he being so inlifted.

Holt Ch. J. said, he was never of Opinion, that Executions were within the Act, tho' the Judges of C. B. were of that Opinion. But there appearing to be Fraud in this Case, the Defendant could not be discharged, tho' it had been upon mesne Process, much less on an Execution. See the Case of *Mason v. Vowson*, *post.* Term Mich. N. 2.

The Duke of Richmond verf. Costelow.

Venue not to be changed in *Scandalum Magnatum*, but upon special Cause.

(5.) **S**IR Peter King moved to change a *Venue* in an Action of *Scandalum Magnatum*; and cited Lord *Shaftsbury's* Case.

Holt Ch. J. said, the Reason in Lord *Shaftsbury's* Case was, because he had an Interest in the City, and therefore he could not have an impartial Jury there; and where there is a special Cause, it is in the Discretion of the Court, whether they will do it or not. But it is not usual to grant it upon the common Affidavit.

Sir Peter King said, that this Action is given by the Statute of Rich. 2. and that imposes a Fine for the Contempt to the Crown; and the late Act of Pardon dispenses with that. To which Holt answered, that it did not pardon the private Offence; and the Court refused to change the *Venue*.

Anonymus.

(6.) MR. Serjeant *Dee* moved to discharge one upon common Bail, upon the lifting Act: The Case was, one was lifted into the Queen's Service, served some Time, and afterwards was discharged, upon his finding another able-bodied Man, who is now in the Army. The Question was, whether the Clause in the Act, *Or find another able-bodied Man*, shall refer to the Time of his Lifting before a Justice of the Peace? Or, whether any Time afterwards will do, provided the Man whom he finds continues in the Service.

Finding an able Man any Time after Lifting, sufficient to intitle to the Benefit of the Lifting Act, if the Man continues in the Service.

The Court were of Opinion, that the latter was sufficient; and thereupon the Man was discharged.

Queen vers. Baker & al.

(7.) SIR Edw. Northey moved to quash a Conviction of forcible Entry, because there wanted *Manu forti intravit*; upon reading the Conviction it was *Vi & Armis intravit*, which the Court said was bad; for it might be *Vi & Armis* and not *Manu forti*, which are the Words of the Statute. *Ideo* quash'd.

Conviction of forcible Entry quashed for Want of *Manu forti*.

Queen vers. Tyrrill and Barber.

(8.) AN Information in Nature of a *Quo Warranto*, Judgment *per Nihil dicit* and a *Capiatur pro Fine*; the Question was, whether this was pardoned by the late Act?

Information in Nature of *Quo Warranto*, Judgment *per Nihil dicit*, and a *Capiatur pro Fine*.

the Fine is pardoned by the late Act, but not the Offence to a private Person.

This

This Cause was spoke to in *Easter Term*; and this Term *Holt Cap' Just'* delivered his Opinion, That an interlocutory Judgment is not within the Exception in the Act; for by a Judgment is meant a final Judgment, it being coupled with Sentence and Decree; and a *Capiat' pro Fine* is only to bring them in to receive the Judgment of the Court. But this being a Matter of Right, *viz.* in a *Quo Warranto*, tho' the Fine be pardoned, yet the Continuance of the Crime is not: And he said, he remember'd a Case upon the Act of Pardon in King *William's* Time, where the Fine for a Nuisance was pardoned, but not the Continuance of the Nuisance. He said [likewise, that where Writs of Error say *si Judicium inde redditum sit*, it extends only to final Judgments; and so does the Exception in the Act of Parliament.

Powell, Powis and *Gould* were of the same Opinion; wherefore Judgment was given, that the Defendant should be ousted of his Office, for committing the Offence; but that the Fine is pardoned.

Queen vers. Layton.

Judgment in a Conviction of forcible Entry may be entered by *quod finis imponatur*, or *Ideo consideratum*; if the former 'tis removeable by *Certiorari*; if the latter, by Writ of Error.

(9.) **A** Conviction of forcible Entry removed by *Certiorari*, and the Judgment given upon the Conviction was *Quod Finis imponatur, &c.* and the Question was, whether the Fine should be entered so, or *Ideo consideratum est*. The Court held either Way was good, there being Precedents both Ways.

If the Entry be *Quod finis imponatur*, then it is removeable by *Certiorari*; if *Ideo consideratum*, then by Writ of Error; they cited *Gresly's Case*, 10 Co. K-- v. *Chandler*, 1 Keble 1 Siderf.

The Court gave Judgment on the *Certiorari*, that the Conviction should be affirmed.

Rice vers. Wilmer.

(10.) IF the Defendant will bring on a Trial by *Proviso*,
 he must first give the Plaintiff a Rule of Notice;
 or else, if the Defendant be nonsuit, such Nonsuit will
 be set aside as irregular.

If the Defendant will bring on a Trial by *Proviso*, he must give the Plaintiff a Rule of Notice.

Dillingham vers. Gately.

(11.) AN Action upon the Case upon a promissory Note,
 and a Demurrer for false *Latin* in the Original,
 which was *locarent ad competum* for *locaret*, &c.

False *Latin* will vitiate a Writ, unless where the Writ sets forth the whole Case, as in an Action upon the Case.

Mr. Raymond for the Plaintiff said, that false *Latin*, if immaterial, shall not abate a Writ.

Per Cur', In an Action upon the Case, the Original sets out the whole Matter, so that the Original is as the Bill; and therefore false *Latin* shall not vitiate it: But if it had been in a Writ, for which there is an exact Form in the Register, then it would be bad. Judgment *Respond. Ouster.*

Collins vers. Delafountain.

(12.) IN this Case Holt Ch. J. said, that upon an Action
 by an Assignee of a Sheriff's Bond, 'tis enough to
 set forth, that the Bond was *pro comparentia* of the Defen-
 dant; and there is no Need of setting out the Matter at
 large.

In an Action by an Assignee of a Sheriff's Bond, 'tis sufficient to say, that the Bond was for the Defendant's Appearance.

Hopwood vers. Barefoot.

(13.) IN a Trial before Holt Cap' Just', in an Action of
 Covenant, this Case was reserved for the Opinion
 of the Court: A Building Lease was made in 1672, by

Where publick Taxes shall be paid by the Lessee or Lessor.

Andrew Collins, for sixty-one Years, in which there was this Covenant, (that the Lessee should pay all Sum and Sums of Money that now is, or shall be assessed or taxed for and in Respect of the Premises demised as aforesaid, for Chimney-Money, Church and Poor, or visited Houses, or otherwise, above and besides the Rent reserved thereupon;) in 1698. the Lessee surrenders this Lease, and a new Lease was made upon the Foot of the former, in which there was the same Covenant as in the former Lease.

After several Arguments at Bar, the Court this Term gave their Opinion *seriatim*, viz.

Gould Just. said, that the only Question was, whether upon the Wording the Covenant, the Lessee should pay the Land-Tax? He said, that the Words, *or otherwise*, make it a Charge upon the Tenant, for they must have some Intent; and this seems to be the plain Intent of the Parties: These two Indentures refer one to the other; the Tax of Royal Aid had been before the Covenant was made, so was Chimney-Money, tho' determined at the Time of making the second Lease, and yet it was put in. It was objected in the Archbishop of *Canterbury's* Case, 10 Co. 46. (where the Question was, whether Lands belonging to the College of *Maidstone* should be exempt from paying Tithes;) that by the Statute 31 H. 8. the Words of which are, *All Monasteries, Colleges, &c. which shall come to the King by Dissolution, or any other Means, should be exempt from paying Tithes;*) that this coming to the King by Act of Parliament, was not within that Statute. But it was there held, that the College being given to the King by the Stat. 1 Ed. 6. and an Act of Parliament, being of a Superior Nature to all other Conveyances, it is not within the general Words of the Statute of 31 H. 8. by *Dissolution, or any other Means*. Likewise where the Statute 13 Eliz. c. 10. speaks of *Deans and Chapters, Colleges, Parsons, Vicars or others, having Spiritual Promotions;* it was resolved, that these Words did not extend to *Bishops, causa qua supra*.

To which he (*i.e. Gould*) answered, that the Statute of *Marlbridge*, c. 19. 2 Inst. 137. provides that Essoins shall be admitted without Oath, in *Curia Baronis vel aliis Curis*, and

yet

yet 'tis held, that these general Words extend to the Courts in *Westminster-hall*. *Ideo* he was of Opinion for the Plaintiff.

Powis the same for the Plaintiff.

Powell Just. said, that this Covenant extends to the Land-Tax; but he did not think it would extend to all Taxes in *futuro*. In Leases, Taxes are distinguished into ordinary, which relate to Poor, Church, &c. and extraordinary, to those imposed by Parliament; and so the Words *or otherwise*, would not extend to Taxes of another Nature, imposed by Parliament. They lay great Weight upon the Archbishop of *Canterbury's* Case, but he did not make any Difference between Persons and Things; and the Reason of the Construction upon the Statute 43 *Elix. c. 10.* is not upon the Difference between Persons and Things, but because they are not religious Persons. If a Tax be given by Parliament, which was never known or *in Esse* before, these Words in the Covenant would not extend to such Taxes: But if it had been worded thus, (*All Taxes that should be hereafter imposed by Parliaments*), all Taxes whatsoever would be included.

As to the second Lease, tho' it be said that the Intent thereof must be construed by the first Lease, in that I do not agree; for we must take Notice of the Taxes that were usual at the Time of making the second Lease.

There are three Sorts of Taxes, 1. *Tenths and Fifteenths*, which are upon Goods; and were uncertain until 8 *Ed. 3.* This continued until the Time of Queen *Elizabeth*, then came in *Subsidies*; by which all Men having such an Estate, were taxed and called *Subsidy-Men*. In forty-one came in the Land-Tax; and to all these Taxes the Covenant will extend, but not to any of a different Nature: And concluded for the Plaintiff.

Holt Ch. J. said, that Taxes, which are for the Benefit of the Crown, and Defence of the Realm, cannot be imposed but by Act of Parliament; yet the Crown has a Right to ask them, upon any Emergency, so they have a virtual Existence, tho' no actual one. 13 *Ed. 4.* 15, 16. *a.* And this is not an extraordinary Tax, but one always in

Viris

Viris, (or *in usu*); he cited a Case 33 H. 8. and *Dyer* 52. pl. where the King granted a Licence to export *Bell-metal*, *Non Obstante* any Act made or to be made; and afterwards an Act was made prohibiting it; and the Judges resolved, that the Act repealed the King's Grant: But the Book says, that otherwise it had been in case of Taxes. (*Memo-rand*, A *Quere* is entered in the Book). He said, that it was likewise adjudged, that where A. made a Lease, and covenanted to discharge the Lessee of all *Burthens and Charges*, (there being no Tax at that Time, but afterwards, a Fifteenth being granted by Parliament,) the Tenant was distrained for it; and this was adjudged within the Covenant; because Taxes are always a Charge *in Viris*; and that that was a stronger Case than this at Bar. Because in the Covenant there no Taxes were named, as in this Case. And tho' by the Statute 4 W. & M. 'tis enacted, *That Tenants shall pay the Land-Tax, and deduct it out of their Rent*; yet that shall not destroy this Covenant; as if Tenant in Tail before the Statute 32 H. 8. had made a Lease for his own Life only, and enters into a Recognizance not to do more; then comes the Statute 32 H. 8. which enables him to make a Lease for three Lives, or twenty-one Years, yet 'twas held, that did not avoid the Recognizance. If this Covenant had been before 1642. it had not bound the Tenant; because there had been no such Tax before that Time; and cited the Case of *Brewster and Kidgell*, in the Time of Will. 3. in Point. He said, the Reason why those special Words in the Stat. 13 Eliz. *Deans and Chapters, and others having Spiritual Promotion*, did not comprehend *Bishops*, was, because they were provided for in the preceding Act.

Vide ant.

Simms vers. *Peters.*

Variance inter
Writ of Er-
ror and the
Record.

(14.) MR. Eyre, Solicitor General, moved to quash a Writ of Error for a Variance in setting out the Record, the Writ mentions only three Defendants, whereas in the Record in C. B. there were five.

Holt Cap' Just', thought it well; because the rest being acquitted, there was no Need to name them in the Writ of Error. *Powell* being of the contrary Opinion, *adjoinatur*. But afterwards, *absente Holt*, the Writ was quash'd *per Cur.*

At the Sittings at *Guild-hall*, before
Holt Ch. J.

Hall vers. *Ux' of William Gates, Executrix to her Husband.*

(15.) IN this Case *Holt* said, that if a Person receives a Woman who runs away from her Husband, and lays out Money for her, the Husband shall not be charged; because the Wife was eloped. But if the Wife continues to live with her Husband, if she takes up necessary Goods, tho' without the Husband's Consent, the Husband is obliged to pay for them, unless he forbids People to trust her.

Husband not obliged to pay Debts the Wife contracts after Elopement.

Crifford vers. *Berry.*

(16.) WAGES are due to *A.* from the *East-India Company*, he orders *B.* to receive the Money, and pay it to *C.* to whom he is indebted; *C.* brings an *Indeb' Assumpsit* against *B.*

Indeb' Assump' lies not by *C.* against *B.* for Money ordered by *A.* to be paid by *B.* to *C.*

At the Trial at *Guild-hall*, *Holt Ch. J.* said, that the Action could not be maintain'd by *C.* whereupon the Plaintiff was nonsuit. *Vide ante.*

Q q q

Mich.

Mich. Term. 1709.

8 *Annae* Reginae in B. R.

Queen verſ. *Tooley, Arch and Lawſon.*

(1.) **T**HE Defendants were indicted at *Hicks's Hall*, one as Principal, and the other two as Accessories, for the Murder of *John Dent*, a Constable; and being tried at the *Old Bailey*, the Jury found a Special Verdict, as follows: That by a Stat. made 27 *Eliz.* for the good Government of *Westminster*, 'tis enacted, that for Reformation of Disorders in that City, the Dean, High Steward, or his Deputy, or two Capital Burgesſes, may hear and punish Incontinencies, according to the Custom of *London*; that by the Custom of *London*, any Constable of any Ward, Parish or Precinct, may execute his Office throughout the whole City; that within the City, Burrough and Liberty of *Westminster*, it has been used, that every Person duly appointed Constable of any Parish, within the Liberties of the City, Burrough and Vill of *Westminster*, his Office of Constable in and through the whole City and Burrough of *Westminster*, and the Liberties thereof, has executed and used to execute. That the 8th of *March* 8 *Annae Reginae*, three Commissioners, duly appointed by Virtue of the Act for the Recruiting the Army, for putting the Act in Execution, by Virtue of that Act, made a Warrant under their Hands and Seals directed to the Constables of the Parish of *St. Margaret's Westminster*, within the said City of *Westminster*, thereby commanding the Constables to make Search within the said City and Liberty for Persons within the Description of that

that Act; which Warrant after that Day was delivered to *Samuel Bray*, then and yet Constable of the Parish of *St. Margaret's*, to be executed; that after that Day *Samuel Bray*, into the Parish of *St. Paul's Covent-Garden*, within the City and Liberty of *Westminster*, to execute that Warrant did come and was; that within the Parish of *St. Paul's Covent-Garden* there was and is a Constable belonging to that Parish; that *Bray* before had sent to *John Dent*, to assist him to execute that Warrant; that after the said 8th of *March*, between eight and nine at Night, at the said Parish of *St. Paul's Covent-Garden*, the said *Samuel Bray*, staying to execute that Warrant, one *Anne Dekins*, in the Street between the Play-house and the *Rose Tavern*, he then and there found, whom he suspected to be a disorderly Person, and then and there as a disorderly Person took into his Custody, as Constable of the City and Liberty of *Westminster*, to carry her to Prison for her safe Custody; that *Anne Dekins* had been before taken up by *Bray*, as Constable, as a disorderly Person; that at her being taken up by *Bray* on the said 8th of *March*, she had not misbehaved herself; that *Bray* had no Warrant to take her or detain her; that after the Taking the said *Anne*, the Prisoners, (*Bray* then having her in his Custody,) in another Place called *Covent-Garden*, did meet, (they being all Strangers to *Anne Dekins*,) drew their Swords and assaulted *Bray*, to rescue her from his Custody; that *Bray* shewed his Constable's Staff, and declared he was about the Queen's Business, and intended the Prisoners no Harm; whereupon they put up their Swords, and *Bray* carried the Woman to the Round-house: That the Prisoners a little after, (the said *Anne* being in the said Prison, in *Covent-Garden* aforesaid,) drew their Swords again, and assaulted the said *Bray* on Account of the Imprisonment of the said *Anne*, and to get her discharged: That *Bray* called some Persons to his Assistance, to keep her in Custody and to defend himself from the Violence of the Prisoners; that *Dent* came to his Assistance; that while *Dent* was in the Constable's Assistance, and before any Stroke given, the Prisoners gave *Dent* the mortal Wound, in the Indictment mentioned,

of

of which he died, as in the Indictment; that the two others were Aiding and Assisting him that gave the Stroke; but whether the Defendants were guilty, &c. This Special Verdict being removed by *Certiorari* in B. R. for the Opinion of the Court, Mr. Raymond argued for the Queen, that 'twas Murder; He said there were two Points to be considered in the Case.

1. Whether *Bray* was in the Execution of his Office, for then 'tis Murder.

2. If not, yet still 'tis Murder; because here was not a sufficient Provocation.

1. Point.

As to the first Point he cited 9 Co. 66. 4 Co. 265. Constables may seize disorderly Persons, and were Officers at Common Law. 4 Inst. 265. 10 Ed. 4. 18. a. 5 H. 7. 7. b. 22 Ed. 4. 35. And not only disorderly Persons but suspicious Persons; also 5 Ed. 3. 14. Lamb. Just. fol. 12. 13 H. 7. 11. a. And we must rely on these Cases, because the Special Verdict only finds her to be a suspicious Person; and it being found, that she was a suspicious Person, *Bray* had Authority to seize her.

Objection.

It will be objected to me, that he being Constable of *St. Margaret's*, was out of his Precinct when he took up *Anne Dekins* in *St. Paul's Covent-Garden*.

Answer.

To which it may be answered, that the Stat. 27 Eliz. found in the Special Verdict, has relative Words to the City of *London*; and by Custom of that City, any Constable within that City may exercise this Authority throughout the City; and tho' Constables are not named in the Statute, yet other Peace Officers being named, he shall be comprehended: As if a remedial Law be made and but one Person mentioned, yet it may extend to others; as the Stat. *De Circumspecte agatis*; where the Bishop of *Norwich* is only named, yet all other Bishops are comprehended; and cited *Fitz. Abr. tit. Prohibition. 2 Inst. 487. 1 R. 2. c. 12. Plowd. Com. 36. b.* 'Tis found that they used to exercise their Authority all over *Westminster*, tho' they have not said Time out of Mind; and tho' in Pleading it should have been set forth, yet 'tis well as 'tis in a Special Verdict; and cited 2 Roll 699. *Trin. 13 Car. Alton v. Gnasb.* His having a Warrant

Warrant from the Commissioners of the Recruit Act, does not hinder him seizing a disorderly Person, in Breach of the Peace.

It may be objected, that she was no disorderly Person. Objection.

To which it may be answered, that the Constable having had her before in his Custody, as a disorderly Person, might well suspect her again, it being between eight and nine at Night, and between the Play-house and the *Rose Tavern*. Answer.

As to the second Point; supposing him not in the Execution of his Office, whether here was a sufficient Provocation to make it Manlaughter only? And he said it was not; for 'tis found, that *A. Dekins* being in Custody, the Prisoners all drew their Swords and assaulted *Bray*, upon which he shewed his Staff; and so if there was no Provocation, 'tis Murder, for the Law implies Malice; and cited *Hale* 45. 3 *Inst.* 52. If *A. Dekins* had resisted herself, and killed the Constable, it had been but Manlaughter; otherwise as in this Case, where a Stander-by kills the Constable. 2d Point.

If speaking Words whereby a Man may suffer Damage in his Reputation, shall never be a sufficient Provocation to make it Manlaughter, as in *Keil* 55. much less a Wrong done to a Stranger; because not so great a Provocation; so that in all Cases there must be a Proportion in the Provocation; as if a Man break my Close, and I with a Stake beat his Brains out, 'tis Murder; as was held in *Margridge's Case*, *Keil* 132. And there must be an open Act of Violence done to make it Manlaughter.

He said, he expected *Hopkin Huggitt's Case* would be cited against him; but this Case is different from that, for there they came civilly and demanded a Sight of the Warrant; but in this Case, the very first Act was an Assault upon the Constable; their Swords were drawn, and an actual Fighting, which increases the Provocation; but here was an Assault upon the Person killed before a Blow given by those of his Party; there was no Warrant, but here was a known Person of the Law: So upon these Reasons he submitted it, 1. Whether he was in Execution.

of his Office: 2. If he was not, yet here was no sufficient Provocation.

Mr. Pengelly *econtra* argued for the Prisoners, that the Constable was not a known Officer; for that no Authority was given to Constables by 27 *Elix.* for that Act is not universal, as the Stat. *De Circumspecte agatis*, or the Statute of *Westm.* concerning the Warden of the *Fleet*; but only a particular Jurisdiction given to particular Persons, from whom the Constable had no Warrant; but this Warrant was given by the Commissioners of the Recruit Act; and tho' in *London*, the Custom may give a Jurisdiction to the Constables to act all over the City, yet in *Westminster* there is no such Custom. The Special Verdict finds, that such a Custom has been used in *Westminster*, but does not say, Time out of Mind; and the Act of *Elix.* being here found, makes it plain that they do not pretend to such a Custom Time out of Mind. In *Hill. 11 Will. 3. King v. Chandler*, 'tis settled, that a Constable cannot go out of his Precinct. But a Justice of the Peace, by his Warrant, may appoint a Constable by Name to execute it any where within the Jurisdiction of the Justice of Peace.

It does not appear, that they were appointed Commissioners for this particular Place or County; but 'tis only said, they were duly appointed Commissioners; and by the Act, the Execution of their Warrant is restrained to particular Officers within the Jurisdiction; and in this Case there was a particular Constable of *Covent-Garden*, so that there was no Failure of Justice; and therefore the Constable here usurped an Authority, and consequently was a Trespasser to all People he took up. But suppose he was a lawful Officer, yet that will not justify acting beyond his Authority; it does not appear that he acted under the Recruit Warrant; and tho' *ex Officio*, if he sees Persons fighting, he may restrain them, or take up suspicious Persons, yet the taking this Woman is not lawful; for she was very decent at the Time, and therefore no Cause of Suspicion: But they should have found her to be a Night-walker, as is usual in those Cases. *Hern's Pleader* 392, 488, 489. 15 *Ed. 1. c. 4. Upper Bench Precedents* 218, 111, 522.

Upon taking up a suspicious Person, it must appear that there was just Cause of Suspicion, as a Felony done; for the Cause of Suspicion is traversable. 12 Co. 92. *Stile* 166. 2 *Roll Abr.* 56, 590, 559. 2 *Inst.* 52, 172. 3 *Inst.* 118, 221. 2 *Vem.* 22. *Bro. Commission*, pl. 3.

If the Constable had no Authority he was in an actual Breach of the Peace, might be indicted, and is liable to all the Consequences of it: But where the Officer is kill'd in the Execution of his Office, no Doubt 'tis Murder. *Cro. Car.* 371, 537. *Jones* 429. *Hale* 56. 4 *Inst.* 333. But in this Case, if *Bray* himself had been kill'd, it had not been Murder, much less killing an Assistant.

As to the Provocation; 'tis found, that they did not see the first Arrest; but they see her under Restraint, and *Bray* was continuing the Trespas; when they came up, they came to rescue the Woman who was unduly restrained; and their seeing her under Restraint takes off all implied Malice; since 'tis not found, that they were upon an ill Design, they cannot be supposed to have any previous Malice.

There is in the Statute of Stabbing, *Jac. 1. c. 8.* a remarkable Passage to this Purpose. So in *Stile* 467. *Keil.* 136.

The Constable, says Mr. *Raymond*, was about the Queen's Business. But they drew their Swords, not imagining he had any such Authority; and as to their Trespas growing more and more outrageous; *Answ.* So did the Provocation.

The Point they went upon in *Hopk. Huggitt's* Case, was upon the Restraining the Liberty of the Subject; and tho' it was objected by Mr. *Raymond*, that there was Fighting, yet that is not to the Purpose; for in *Mawgridge's* Case, the first Act of Violence being done by *Mawgridge*, it was held Murder, notwithstanding the Resistance that *Cope* made. *Keil.* 136.

If there was no original Malice against *Bray*, there could be no derivative Malice to *Dent*, who came to his Assistance; for where there is no Malice in the Principal, it cannot *Egredere personam*. *Hale* 150. *Dyer* 128. Countess of *Salisbury's* Case.

Cafe. Plowden 100. b. Stile 469. Keil. 63. Thomson's Cafe. Keil. 87. 12 Co. 57. Keil. 115.

Upon Arguing this Cafe,

Holt Cap' Just' said, you have taken the Stat. 15 Ed. 3. too largely; for certainly a Suspicion barely conceived by the Constable, is not sufficient, without some Act of Lewdness done: As to his having taken her up before, it does not appear that that was lawful. But whether it was or no, it would not justify his taking her up again; and tho' he was a Constable, his Staff does not give him a Licence to do what he pleases; and if he is not in the Execution of his Office, but breaking the Peace, then surely he may be resisted; and as for *Dent*, he assaulted her, and 'tis all a Continuance of the same Act; and tho' it be not lawful to rescue, yet certainly the Taking her may be a Provocation; and that is *Hopk. Huggit's Cafe*.

Powell said, he would extend this Act as far as he could to suppress Vice. But taking it for granted, that the Constable was within his Jurisdiction, yet he could not justify taking up this Woman. When-ever a Constable may take up any Person, it must be either for an actual Breach of the Peace, or upon good Grounds of Suspicion; and the Cause of his Suspicion must be shewn, because 'tis traversable; and in case of Suspicion, where there is a Felony done, there is no Difference between a publick and a private Person: But when a Constable has a Warrant, he is tied up to that Warrant, to act only as that directs; therefore *Bray* having taken up this Woman, without any just Cause of Suspicion, she was illegally imprisoned; and therefore a Provocation to all the People of *England*.

Powis and *Gould* the same.

This Cafe was adjourned to *Serjeants-Inn*, for the Opinion of the twelve Judges; and after several Arguments, seven of them, viz. *Holt Cap' Just' de B. R. Powell, Powis* and *Gould Justices de B. R.* and *Bury, Price* and *Lovel Bar' de Scac'*, were of Opinion, that the Prisoners were guilty of *Manlaughter*; and *Trevor Cap' Just'*, *Tracy, Blenco* and *Dormer Just' de C. B.* and *Ward Cap' Bar' de Scacc'*, were of

of Opinion, that it was Murder; and the last Day of the Term, the Prisoners being brought to the Bar de B. R. Holt Cap. Just. delivered the Opinion of the twelve Judges, as follows.

He said, he would first shew the Reasons the seven who thought it Manslaughter, grounded their Opinion upon; and those were, 1st, That it was a sudden Action, without any precedent Malice, or apparent Design of doing Hurt; but only to prevent the Imprisonment of the Woman, and to rescue her who was unlawfully restrained of her Liberty; and if the Woman was unlawfully imprisoned, then it cannot be Murder; and cited 4 Co. 40. Young's Case, and 9 Co. Mackelly's Case; where 'tis held, that if a Constable be kill'd in the Execution of his Office, 'tis Murder; but 'tis otherwise, when he is doing a wrongful and oppressive Act.

'Tis not only necessary to make it Murder, that the Constable is in the Execution of his Office, but he must give Notice that he is come to keep the Peace; and cited Thomson's Case, Keil. 66, and so are Young's and Mackelly's Case to be understood; for if he does not give Notice, the Party may reasonably suppose that he came to assault his Adversary.

The second Thing to be considered is, whether Bray was in the Execution of his Office. The Statute Eliz. does not name a Constable; but only a Power is thereby given to the Dean, High Steward and Capital Burgessees of Westminster; but sure it does not follow, that the Constable has such a Power; and we are all agreed, that the Power of the Constable is no greater, than it was before this Act; one of my Brethren held, that Bray was Constable *de facto*; but that cannot be, since there was a Constable at that Time of Covent-Garden. Now if the Constable of one Parish, has not Power over the whole Liberty, then Bray had no more Authority than if he had been no Constable at all.

Suppose, for Argument Sake, that Bray was Constable of Covent-Garden; I am of Opinion, that the Taking up the Woman was illegal, tho' she had been in his Custody before; and if so, he did not act as a Constable, but as a common

common Oppressor. When he had her in his Custody before, the Verdict does not find that she was guilty of any disorderly Act; 'tis not a Constable's suspecting, that will justify his taking up a Person, but there must be just Grounds of Suspicion; as in Case of a Felony committed, and that is traversable. 2 Inst. 52. It would be hard, that the Liberty of the Subject should depend upon the Will of the Constable; and shall his not liking the Woman's Looks be just Cause of Suspicion?

3. The Prisoners had sufficient Provocation; for if one is imprisoned upon unlawful Authority, it is a sufficient Provocation, out of Compassion, much more when 'tis done under Colour of Justice; and cited *Royston's Case*, 2 Cro. and 12 Co. 87. And where the Liberty of the Subject is invaded, 'tis a Provocation to all the Subjects of England. He said a Constable cannot Arrest, but where he sees an actual Breach of the Peace; but if the Affray be over, and Things quiet, he cannot Arrest. 3 Cro. 372. 30 H. 7. fol. 10. Constables have Authority by the Statute to arrest Persons, but that must be by Warrant from a Justice of the Peace; but in this Case there was no Warrant.

The Reasons of the five Judges that it was Murder, were these, Four of them did agree, that the Constable had no Authority; but one was of Opinion, that shewing his Staff was sufficient; but I never knew, that the Constable's Staff was of such Efficacy, when the Constable himself had no Authority.

Four of them held, that she, being a Stranger to them, 'twas no Provocation; otherwise if she had been a Friend or Servant. But surely a Man ought to be concerned for *Magna Charta*, and the Laws; and if any against the Law imprison a Man, he is an Offender against *Magna Charta*. We seven hold this to be no Provocation, and we have good Authority for it in *Hopk. Haggitt's Case*; and this Case is stronger than that; the Judges that were of Opinion that that Case was Murder, went upon this Reason, viz. that he was a Stranger to the Person impressed; but tho' of a different Opinion, yet gave Judgment according to the Opinion of the Eight. It was not the Fighting that

that made it Manslaughter, but the Provocation by the unlawful Imprisonment; for if one without Provocation, draw his Sword upon another, and the second draw, they fight, and after mutual Passes the second is kill'd, 'tis Murder. The five that think this Case Murder, say, that to a Relation or a Friend, 'tis a Provocation; but not to a Stranger; but that is a Distinction not to be met with in the Books; he cited *Plowd. 101.* Where two fight upon Malice prepenſe, the Servant of one of them, not knowing of the Malice, comes to assist his Maſter, and kills the other, this is held but Manslaughter in the Servant, which Case is abridged *Hale's Pl. Cor. 51.* The Reason of the Case above, is not that he was Servant; but because he knew not of the Malice.

They say that *Hopk. Huggitt's Case* is *prima Impreſſionis*; but yet 'tis of good Authority, being given upon mature Deliberation, and resolved by eight of the Judges.

Then say they, that in the Case at Bar, it could not be a Provocation to the Prisoners, because they knew not that she was illegally arrested; but surely *Ignorantia Facti* will excuse, but never condemn a Man: A Man in this Case acts at his Peril, but he must not lose Life for his Ignorance of the Fact, when he happens to be in the Right; and cited *Sir M. Ferrar's Case, Cro. Car. 271.* where he was arrested by a Warrant that named him Knight, whereas he was a Baronet; his Servant kills the Bailiff, this adjudged Manslaughter only, because he was arrested upon an ill Warrant. He put a Case, that suppose a Man has a Judgment against him, and goes abroad, he is informed, upon his Return, that there are Bailiffs in his House, he goes in and kills one of them, but it proves that they are Thieves that came to rob him; in this Case he is in no Fault: It was likewise objected by the Five, that it is dangerous to allow such a Power to the Mob; but I think that no proper Word to be used in a Court of Justice; and a Provocation does not make it an Allowing the Offence, but only a Mitigation of the Punishment; and for this the Law makes the Distinction between Murder and Manslaughter. They say, that the Prisoners came after the Imprisonment was

over;

Præſentia, to appear in Person.

over; but certainly their putting her in Prison, and not carrying her before a Justice, as they should have done, is an Aggravation; and why should *Bray* call *Dent* to his Assistance after she was in Prison. All agreed, that he was not Constable of *Covent-Garden*, therefore it could not be Murder; For if a Writ be directed to the Sheriff of *Middlesex*, and the Man steps into *Bucks*, the Sheriff follows and arrests him in *Bucks*, he kills the Sheriff, this is only Manslaughter.

I am as much for a Reformation as any one, but in a legal Manner; for *Vir bonus est quis, qui consilia Patrium qui Leges juraq; servat*; and concluded it only Manslaughter. But Note; The Court would not call the Prisoners to Judgment, nor let them pray the Benefit of the Clergy Act; nor suffer them to waive the Queen's Pardon; because the Court was bound to take Notice of the late Act of Grace, as a general Law, whereby the Manslaughter is pardoned. But they ordered a special Entry to be made upon the Roll, that the Court would not give any Judgment, because of the general Act of Pardon; therefore they were discharged as to the Indictment. Upon which the Sheriff produced a Writ of Appeal, which was delivered to him; and the Court held, that the Prisoners were in Custody as to the Appeal, by the Delivery of the Writ to the Sheriff.

Mason vers. Kowson.

A. in Execution not to be discharged by the Act for enlisting Soldiers.
Vide ante.

(2.) A Judgment was had against the Defendant *Kowson*, and after Judgment obtained, he voluntarily listed himself a Soldier; and after the said Listing, he was taken in Execution by Virtue of a *Cap. ad Satisf.* upon that Judgment; and a Motion was this Term, that he might be discharged according to the late Act of Parliament, which says, *That any Person, that voluntarily lists himself a Soldier, shall not be taken out of her Majesty's Service by any Process whatsoever.* But *per Cur.* the Motion was denied; for the Words, *any Process*, must be intended only of a mean Process, and not be extended to Executions; for that would be

be hard upon Creditors, and put them *sans Remedy*.
Wherefore *Vowson* was not discharged. *Vide ante Term*
Trin. N. 4. Mascall ver. Davys.

Mr. Pool's Case.

(3.) **A Habeas Corpus** was directed to the Keeper of the *Custom of London* to sue the *Counier*, to bring up the Body of --- *Pool*, to which they return the Custom; that a Feme Covert Sole trading shall be sued as a Feme Sole, and that the Husband is neither chargeable in Body or Estate. as a Feme Sole.

Mr. Salkeld objected, that the Custom was bad, because unreasonable; for the Husband might take her Goods, &c. and if she were liable for Debts, and not have her own Goods to satisfy them, then she may be detained in Custody, without Possibility of ever being released.

But *per Cur'*, The Husband has nothing to do with the Goods or Money with which she trades, and those are liable to Debts. As she may be sued Sole, so may she sue Sole for Debts owing to her within the City; but for those due to her elsewhere the Husband must join.

ni If a Woman be found guilty of a Battery, and fined, the Husband shall not be liable.

(4.) *Holt, U. c.* made it a Rule of Court, and ordered it to be screen'd up in the Office, That no Bail-Bond shall be assigned in Town till four Days after the Return of the Writ; and not 'till six Days after the Return in a Country Cause.

Anonymous.

Fitzgerrard vers. Trant.

A Covenant
not to sue one
of the Obli-
gors, no Dis-
charge as to
the Rest.

(6.) **D**EBT upon a Bond by the Executor of the Ob-
lige: Upon Oyer of the Bond, it appeared
A. B. and C. were bound jointly and severally to the Ob-
lige: the Defendant pleaded a Release made by the Ob-
lige to B. one of the Obligors; and upon Oyer of the Re-
lease, it appeared that the Oblige covenanted with B. not
to sue him upon this Obligation; the Plaintiff demurs;
and adjudged, that a Covenant not to sue one of the Obli-
gors, where there are several, is no Discharge against the
others. (2.) Judgment for the Plaintiff; *Absente Holt.*

Smith vers. Bowen.

Burning in
the Hand in
an Appeal
pardoned.

(7.) **T**HE Appeal being tried at Bar this Term, the
Appellee was found guilty of Manslaughter on-
ly: Whereupon he prayed the Benefit of his Clergy; and
the Court being of Opinion, that the Statute that gives
the Clergy extends to Appeals, and that the Burning in
the Hand, being no Part of their Judgment, the Queen
could Pardon it; according to *Biggins's Case*, 5 Co 50.
Thereupon the Appellee was immediately discharged with-
out Bail, being pardoned by the late Act of Grace.

Dr. Butler vers. Cobbet.

Mandamus to
Commission-
ers of the
Land-Tax, to
tax Estates e-
qually.

(8.) **M**andamus directed to the Vice-Chancellor of Cam-
bridge, and other Commissioners of the Land-
Tax, to make an equal Assessment upon the Inhabitants
of *St. Andrew's Barnwell*.

Sir *Tho. Parker* moved to quash the Writ; for that it
should have been, to make an equal Assessment upon the
Occupiers of the Land; for every Occupier may not be an
Inhabitant.

Holt Ch. J. said, the Writ was bad; but if it was good, a *Mandamus* was not a proper Remedy for an unequal Taxation; but the proper Remedy is by Appeal to the Commissioners: But perhaps if the Assessors refuse to tax any Part, as the Case of *Starbridge Fair* is, a *Mandamus* lies.

Powell said, It was usual to grant *Mandamus's* to Overseers, when they will make no Taxation; but not upon Suggestion, that they intend to make an unequal Taxation.

Another Exception was taken to the Writ, that it set forth the Year in Figures; but being in *Roman* Figures, it might be good for all that; otherwise if in *English* Figures. The Writ was quashed *nisi*.

Stebbing vers. Warner

(9.) CASE; and declare that the Defendant, endeavouring to charge the Plaintiff to have him indicted for Felony, said of the Plaintiff these Words, *Damn him he is a Pick-pocket*; & postea in praesentia quamplurimorum apud, &c. look here, he has pick'd my Pocket, and taken out all my Silver and Gold, and damn him he is a Pick-pocket; & postea apud N. in alio quodam Colloquio, &c. The Rogue has pull'd out my Pocket, and stole all my Silver and Gold from me; & postea, &c. he has pick'd my Pocket of all my Money, and damn the Rogue, he is a Pick-pocket.

Words.
Damn him he
is a Pick-
pocket.

Sir Edward Northey for the Plaintiff argued, that tho' it is not said, that he feloniously pick'd the Defendant's Pocket, yet it must be taken in the same Sense that it was spoken; which was, that he pick'd his Money out of his Pocket, which is Felony: Besides it is laid, that the Defendant spoke them with Intent to charge the Plaintiff with Felony, and the Jury have found it to be with that Intent; for they found the Defendant guilty of the Fact charged in the Narr'.

The Authorities he cited were *Cra. Car.* 327, 329. *Pen-son vers. Gooday.* 2 *Brownlee* 280. *Stile* 150. *Bulstrode* 134. 1 *Roll's Abr.* 68. *Cro. Car.* 136. *Yelv.* 136.

Raymond

Raymond ad idem: Pick-pocket is actionable; and cited Sir *T. Jones* 235, 2 *Lev.* 136. The Case of *Speed and Perry*, Trin. 4 *Anna Regina*, where *Clipper and Corner* is adjudged actionable; and 2 *Vent.* 172.

Mr. Thomson, upon whose Motion the Defendant was to shew Cause why Judgment should not be arrested, said, that Pick-pocket alone was not actionable; and the Words were spoken at different Times, and upon different Colloquium; and the Intention to charge the Plaintiff with Felony, is laid only to the first Words, viz. *Damn him he is a Pick-pocket*; and if Words that are not actionable, are joined with Words actionable, but spoke at different Times, and under different Colloquiums, and intire Damages given, Judgment ought to be arrested; and the Words being spoke at different Times, one Part shall not be taken to explain the other; and cited 2 *Lev.* 51.

Holt, &c. said, It would be hard to explain Words spoken at one Time by what is said after.

Holt: To say a Man is a Pick-pocket, and has pick'd my Pocket, in common Acceptation is actionable: But they have over-done it; and if there are any Words found, that are not actionable, Judgment must be arrested; and another Day this Term, Judgment was arrested.

Jones vers. *Willson*.

Two Counts, one on a Promise to the Intestate, the other to himself as Administrator; Nonfuit shall pay Costs for the whole.

(10.) **A**ction brought by an Administrator, and declares upon two Counts; one upon a Promise to the Intestate in his Life-time, the other upon a Promise to the Plaintiff himself, and names himself Administrator in both; and upon the Trial the Plaintiff was nonfuit; and the Question was, whether he should pay Costs?

Powell J. Holt *absente*, said, that these two Counts could not be joined; and if an intire Judgment had been given, Judgment should have been arrested. But it is a Question, whether it might not have been made good, by taking Judgment upon one Count only. But in this Case the Plaintiff

Plaintiff must pay Costs, because the Nonsuit goes to the whole; and so it was ruled by Powell, Powis and Gould.

Then Mr. Pargely took another Exception, that the Office was not laid with a Continuance; but it was that

the Ditches were dug within a Time and such

Anonymus.

(11.) **MR. Snell** moved, that the Plaintiff in a Writ of Error of a Judgment in Ireland, might assign his Errors by Attorney, upon Affidavit, that he was resident in Ireland; and offered to find sufficient Bail. Granted.

Errors on a Judgment in Ireland assigned here by Attorney.

Mr. Harcourt Cler' Coron' said, it had been done so in the Case of York vers. Medley.

Now exists, that the Plaintiff did commit, &c. to the Defendant, &c. to which

Leveridge vers. Hoskins.

(12.) **IN** Case the Plaintiff declares, That he was possess'd of a Farm and a River, apud D. in Com' Devon; and that the Defendant, to damage the Plaintiff's Farm and River, did at a Place, vocat' Davys's Close, in Com' Dorset, dig two Ditches, and diverted the Plaintiff's Water out of the Rivers, and damaged the Meadows; but does not say per quod.

Case, for digging Ditches and diverting his River, or Trespass.

It was objected by Mr. Pengelly, who moved in Arrest of Judgment, that this Declaration was ill; not shewing, that the Diversion of the Water was consequential of the Digging the Ditches, which is the Jet or Gift of the Action; so that this is no more than Trespass.

But the Court were of Opinion, that after Verdict, it shall be intended that it was proved to be consequential.

Then another Exception was taken, that the Action is brought in a wrong County; for it should be brought where the Trenches were dug.

Trial.

But per Holt, &c. 'Tis good; for here is Cause of Action that arises in both Counties, and the Action may be brought in either; and if there is a Conspiracy in one County, and an Indictment in another, the Action may be brought in either. But if a Nuisance be erected in one

Cause of Action arising in two Counties may be brought in either.

The

U u u

County

County, to the Damage of a Man in another, the Affise must be brought in *Confinio comitatum*.

Then Mr. Pengelly took another Exception, that the Offence was not laid with a *Continuando*; but it was, that the Ditches were dug such a Day, and his Close damag'd, &c. *diversis diebus & vicibus*, between such a Time and such a Time; and cited *Hambleton* vers. *Vere*, 1 *Lev.* 299. 2 *Saund.* 196. which Holt said was not like this Case.

Joddrell vers. Heathcot.

Declaration
in Debt for
Rent, on a
Demise by
Mentionat
existit, ill.

(13.) IN Debt for Rent, the Defendant declares, *Quod cum per quandam Indenturam factam, &c. Mentionatum existit*, that the Plaintiff did demise, &c. to the Defendant, &c. the Defendant pleads an ill Plea, to which the Plaintiff demurs, and afterwards pleads over.

The Counsel for the Defendant took Exception to the Declaration, that *Mentionat existit* is ill in this Case. *Raymond*, to maintain the Declaration, cited 2 *Lev.* 74. where *Testamentum existit* is held well in Debt; also he said, that tho' it was ill upon a special Demurrer, yet it is help'd by their Pleading over. *Pengelly* for the Defendant said, that the Case in 2 *Lev.* is Debt upon a Charter-party, which is the same as Covenant, which is agreed on all Hands to be well; and in 3 *Keb.* 94. the Difference is taken, and there held, that laying a Demise by Way of *Testamentum existit* is ill; he cited likewise *Lev.* 534. 5. 2 *Saund.* 319. And as to the second Exception, that it was help'd by the Plea; he said, that the Plea could not admit more than was well alledged; And that declaring in Trespais with a *Quod cum* is ill; he cited 2 *Lev.* 206, 193. 2 *Jones* 218, 197.

Powell held the Declaration ill; for the Demise must be alledged so certainly, as that it may be travers'd. He said, it had been held well in Covenant, because the Precedents are so; and as to the Case in *Lev.* of Debt upon a Charter-party, that is the same as Covenant; and declaring in Trespais by a *Quod cum*, has always been held ill.

The

The Counsel for the Plaintiff, seeing the Opinion of the Court against them, prayed Leave to discontinue; which was granted upon Payment of Costs.

Discontinu-
ance.

Queen vers. The Parish of St. Giles.

(14.) **T**HE Inhabitants of the Parish of St. Giles ap-
pealed to the Sessions upon an Order made for
the Levying a Poores Rate, in which some were unequally
taxed; upon which the Sessions dismiss'd the Appeal, and
shew for Cause in the Order of Dismission, *That the Court*
being of Opinion, that the Appeal should have been to the
next Quarter-Sessions after the making the Rate, and not af-
ter the Taking the Distress; Ideo the Court does dismiss the
Appeal. And this Order being removed into B. R. by Cer-
tiarari.

Poores Rate.
Appeal to the
Sessions in
what Time.

Mr. Eyre Solicitor General, Sir Tho. Parker, and Mr. Whit-
acre argued for confirming the Order of Sessions for dismiss-
ion of the Appeal. That tho' 43 Eliz. does not say, that
the Order shall be to the next Quarter-Sessions, yet it is
necessary so to be, for else it will create Confusion, no
Time being limited by the Act: For if not the first, it
cannot be brought in any certain Time. That this is not
an Appeal for Relief, but to quash the Rate, which should
be before any Payment upon it, or Distress for it; for if
the Rate is not good, an Action lies against the Overseers
for taking the Distress.

No special
Bail in Error
as a Bottom
see Bond.

Sir Edw. Northey and Mr. Raymond cont. That it is not
necessary the Appeal should be to the next Quarter-Ses-
sions, for there is no Time limited by the Act; and that
being alledged for the Reason of the Order of Dismission,
'tis bad. Besides, this Appeal was at the next Quarter-
Sessions after the Grievance.

Per Cur', viz. Holt Cap' Just', Powell, Parnis, and Gould.
This Appeal need not be to the next Quarter-Sessions;
but the Error of the Justices is, that they did not proceed
upon it when it was before them, and give Judgment,
whether the Rate was good or not: Tho' one of the Par-

ties

Appeal by the ties may have a particular Appeal, yet this being a Rate, which they think not according to the Act, they may appeal together. But it being assigned for a Reason, that the Appeal was not to the next Quarter-Sessions, the Court quashed the Order of Dismissal.

Gately vers. *Gillingham*.

In Actions by Original there must be fifteen Days between the *Teste* and Return both of Writs and Process.

(15.) CASE by Original upon a Promissory Note; Judgment by Default, and a Writ of Enquiry *Teste* 8 Nov. returnable *Octabis Martini*. *Whitacre* moved in Arrest of Judgment, for that there was not fifteen Days between the *Teste* and Return of the Writ of Enquiry; for in all judicial Writs, where you proceed by Original, there must be fifteen Days between the *Teste* and Return, not only in the Writ, but also in the subsequent Process: And accordingly the Court, (*Holt absente*), inclined that it was ill. *Sed adjournatur*.

Bull vers. *Clifton*.

No special Bail in Error on a Bottom-ree Bond.

(16.) SIR *Edw. Northey* moved, that the Plaintiff in Error might put in special Bail. This was an Action upon the Case on a Bottomree Bond, to pay Money on a Contingency, the Condition of which was, *That if the Ship or Vessel called the Oley Frigate, &c. shall with all Speed sail from the River of Thames to China, &c. without Deviation and Return to the River within thirty-six Kalendar Months, Hazard of the Sea excepted; and if the said J. S. shall within the said thirty-six Kalendar Months, or thirty Days after the Arrival of the said Ship, pay &c. to J. S. then the Obligation to be void.*

Holt said, this is not a Bond only for the Payment of Money, for if he does not go the Voyage, he forfeits the Penalty; for his going the Voyage, Return, and Payment of the Money, are all Conditions; and inclined, that it did not require special Bail. *Sed adjournatur*.

Queen vers. Dr. Wall.

(17.) **I**N this Case *Holt* said, that if a Parish Priest puts in a Clerk, he cannot turn him out at Pleasure: For he is then the Clerk of the Parish, and not the Parson's Clerk only.

A Parish Clerk not the Parson's only, nor removable by him.

Queen vers. Mickal.

(18.) **A** Motion was made for a *Habeas Corpus* to bring up the Body of the Defendant, charged with picking a Pocket; and offered to bring unexceptionable Bail; and to send down a Tipstaff to enquire of his Reputation.

No Bail (on a *Habeas Corpus* to bring up a Pick-pocket).

Holt: Tho' we have a discretionary Power, yet it being certified, (sworn), that he was charged with the Fact, I think we ought to refuse to bail him; which (on consulting his Companions,) he accordingly did.

At the Sittings at *Guild-hall*, before
Holt Ch. J.

Tybbald vers. Tregott.

(19.) **I**N Case, by a Silk Dyer against his Servant for Money received to his Use; upon the Evidence it appeared, that *A.* sending Silk to be died by the Plaintiff, the Plaintiff sent his Servant, the Defendant, home with it, and *A.* paid him for every Parcel as he received it; *A.* was produced as an Evidence, that he paid the Money to the Defendant. But *Holt* would not admit his Evidence; for that would be to admit a Creditor to swear in Discharge of himself: He said, that if a Man pays Money by his

Evidence. The Master pays Money; he is no Evidence; contra of a Servant.

X x x

Servant,

Servant, the Servant may be a Witness; but that is allow'd for the Necessity of the Thing.

Taylor vers.

One not a
Witness may
Evidence a
Lease, &c.

(10.) **T**WAS said by Holt Ch. J. That a Person who has not set his Hand to the Witnessing a Lease, may be Witness to it, if those that signed it do not appear; and so he ruled it. For in the Case of a Lease of Years, 'tis sufficient if the Lessor only signs in the Witnesses Presence. And so it seems in other Grants of Chattels: *Quere*, if so of Freeholds, &c.

Writ of En-
quiry.

And 'twas also said by him, that tho' Defence be made upon a Writ of Enquiry, yet it would not aid a Judgment, if irregularly obtained.

At the sittings at Guild-hall, before Holt Ch. J. The we have a discretionary Power, yet it being certain (twice) that he was charged with the fact, I think we ought to refuse to bail him; which (on consulting his Companions) he accordingly did.

At the sittings at Guild-hall, before Holt Ch. J.

Tybbalds vers. Trevett.

Evidence.
The Master
pays Money;
he is no E-
vidence; re-
vise of a ser-
vant.

(12.) **I**N Case, by a Silk Dyer against his Servant for Money received to his Use; upon the Evidence it appeared, that A. lending Silk to be dyed by the Plaintiff, the Plaintiff lent his Servant, the Defendant, home with it, and A. paid him for every Parcel as he received it; A. was proved as an Evidence; that he paid the Money to the Defendant. But Holt would not admit his Evidence; for that would be to admit a Creditor to swear in Discharge of himself: He said, that if a Man pays Money by his Servant, the Servant is not Evidence.

Hill. Term. 1709.

8 *Annæ* Reginae in B. R.

Memorand, Holt Ch. J. being sick, he could not attend this Term, except one Day, which was *Thursday, Feb. 9.*

Bishop vers. *Eagle.*

(1.) **T**HE Plaintiff declared upon a Prohibition; and upon Demurrer to the Declaration, *Salkeld* took Exception to it, because the Declaration sets forth, that the Defendant sued in the Spiritual Court, *post Regiam Prohibitionem ei prius inde in contrarium direct*, but does not say (*deliberat*); and here appears no Cause of Action, since it is not set forth that the Prohibition was delivered. This Matter was moved last Term; and this Term the Court was of Opinion, *Holt absente*, that when you proceed for Damages, then it must be set forth, that the Prohibition was delivered, and also a *Venus* laid: But in this Case, which is only to maintain the Jurisdiction of this Court, it is not necessary.

Damages in Prohibition; Difference where you proceed for Damages, and when to maintain the Jurisdiction of the Common Law Courts. Prohibition.

Foster vers. *Burden.*

(2.) **T**HE Case was, Judgment in Ejectment upon a Demise of three Years; the Defendant brings a Writ of Error in B. R. and the Defendant in Error sues

Venus cannot be changed in *Scire fac* upon Judgment in Ejectment.

out

out a *Scire fac'*, *quare Execui' non*; to which the Plaintiff in Error pleads, that he has paid 200*l.* in Satisfaction of the Term and Damages; and upon Issue joined, Serjeant *Cheshire* moved to change the *Venue* out of *Yorkshire* into *Middlesex*. But the Court denied the Motion, because the Ejectment is local; and the *Scire Fac'* being grounded thereon, the *Venue* could not be chang'd.

Todd & Ux' vers. Redford.

When Baron and Feme to join in Battery, and when not.

Damages.
Per quod when the Gift of the Action, and when only in Aggravation.

(3.) **A**ction of Assault and Battery is brought by the Husband and Wife; the Declaration sets forth, that the Defendant such a Day, &c. assaulted *Eleanor* the Wife, and driving a Coach over her, bruised her, &c. & *ratione inde*, the Husband laid out *diversas denar' Summas* for the Cure, &c. & *al' enormia usdem intulit ad Grave damnum ipsorum*; the Defendant pleaded in Abatement, that his Name was *Redborn* and not *Redford*; and on Issue, and Verdict for the Plaintiff, Serjeant *Grove* moved in Arrest of Judgment; and objected, that in this Case, the Husband and Wife should not have joined, because the Damage is laid to be for the Money laid out in Cure of the Wife as well as for the Battery, and intire Damages being given, 'tis bad for the whole; and cited 1 *Sid.* 328. *Yelv.* 106. 2 *Vent.* 29. 2 *Cro.* 525. 1 *Lev.* 3. But the Husband should have sued alone for the Money laid out in the Cure.

Raymond for the Plaintiff said, he agreed, the Cases cited by *Grove* were so; but they are all in Actions of Assaults, committed by Husband and Wife: But in this Case the Tort is only upon the Wife, and the *Ratione inde*, &c. is only consequential Damage; and so was it held in the Case of *Russell v. Corn*, in Assault and Battery brought by Husband and Wife, *per quod negotia* of the Husband *remanserunt infecta*; for there Judgment was given for the Plaintiff, because they held the *per quod* only consequential Damage, which is a Case in Point; and the *alia enormia* are not certain enough

to

to have Damages, and therefore it is never considered by a Jury.

Powell said, That where Husband and Wife join in Action of Assault and Battery for beating both, 'tis wrong; but may be help'd by a Verdict, separating the Damages; and here the Gift of the Action is only Beating of the Wife, and the *Ratione inde* is only in Aggravation of Damages. As to the *Alia Enormia* it is too general to suppose Damages given for it. He said also, that Husband and Wife cannot join in Assault and Battery, *per quod consortium amittit*, for the *per quod* in such Case is the Gift of the Action; and in the Case at Bar, if the *Ratione inde* had been left out, the Surgeon's Bill might have been given in Evidence, in Aggravation of Damages. Judgment *pro Quer'*; Holt *absente*.

Anonymus.

(4.) IF a *Mandamus*, *Alias* and *Pluries* be issued, a Return in Strictness ought to be to the *Pluries*; because the Party is in some Sort of Contempt for disobeying the two first Writs; yet if there be no Damage to the Party, a Return to the original *Mandamus* may be filed.

Queen vers. The Parish of Kidderminster.

(5.) MR. Bains moved to quash an Order of Removal; the Order is directed to the Overseers and Church-wardens of the Parish of K. and sets forth, that whereas Complaint has been made by you, (and does not say whom). *Per Cur'*, 'Tis well; because it refers to the Persons before-mentioned. 2d Exception was, that there is no Adjudication; and upon reading the Order, it appeared, that as to the Place of his last legal Settlement, there was a good Adjudication, by saying, *it appears to us, &c.* But saying, *he is likely to become chargeable*, is no Adjudication, without saying, *it appears to us, &c.*; and upon this last Exception this Order was quashed.

Y y y

Anonymus.

Order of two
Justices quash-
ed.

Anonymous. (6.) **M**R. *Pengelly* moved to quash an Order made by two Justices; his Exception was, that it does not appear, that they were Justices for that County; for it is set forth to be made by A. and B. two Justices *com. p. m.* and here is no County in the Body of the Order for the *p. m.* to refer to, and it shall not refer to the County in the Margin; whereupon it was quashed *per Cur.*

Queen vers. Cecill.

Order to pay
Wages in
Husbandry,

upon the Oath
of the Party.

(7.) **M**R. *Gilbert* moved to quash an Order of Sessions; made upon the *Master* to pay 7*l.* Wages to *J. S.* his Servant in Husbandry, and made two Objections to the Order; 1. That *J. S.* was a Covenant Servant, and the Statute does not extend to such, tho' in Husbandry. 2. That the Order appears to be made upon the Oath of *J. S.* the Servant, which is contrary to the Rule of Evidence, that the Servant's Oath should be taken in his own Cause; and as to its being set forth, that 'tis upon hearing of Counsel, that does not alter the Case. Besides, there may be other Evidence; for tho' perhaps others cannot prove the Contract, yet they may prove the Service.

Lurnych com. This is not to be bound by that Rule; for here is a Power given by an Act of Parliament, for the Benefit of poor Servants. Besides, it does not appear that there was other Evidence, and here is an Adjudication, that so much is due. This is done every Day, on Orders for the Settlement of poor People, upon the Party's single Oath.

Raymond in Answer to *Lurnych*. This is not like the Case of Settlements, for 'tis indifferent to the Party where he is settled.

To Mr. *Gilbert*'s first Objection, *Powell J.* held, that the Stat. 5 *Elix.* having a favourable Construction, has been extended

extended to Covenant Servants, if in Husbandry. As to the second, he would not take it, that there was other Evidence; that he believed the Wages were certain in most Counties, and the Way is to examine the Time of Service by others, and the Justices to adjust the *Quantum*. We allow a Man to be Evidence in his own Cause for Necessity, as in the Statute of Hue and Cry; but here may be other Evidence. (Note; The Justices at Sessions are to appoint Statute Wages.) But 'twas quashed; *Holt absente*.

*Parish of St. Saviour's Southwark vers.
The Parish of Cripplegate.*

(8.) **B**onnick moved to quash an Order of Sessions, made to remove a Child of three Years old to the Place of its Birth; and his Exception was, that it should have been sent to the Place where the Father was settled; because the Settlement of the Father is the Settlement of the Child.

Place of Birth
a good Settlement.

Northey to maintain the Order said, that it had been often adjudged, that the Place of Birth is a Settlement, and good, till the Settlement of the Father is found out; and 'tis possible the Father might have no Settlement, as if he was an *Irishman*, or an Alien, and has got no Settlement here, in which Cases, the Place of Birth is the Settlement of the Child.

Powell: The Place of Birth is the Settlement of a Bastard Child; but a Legitimate Child is Part of the Father's Family, and must be settled with him; but if the Father's Settlement cannot be found, then the Place of its Birth is its Settlement. Therefore if a Child be drop'd in the Parish of A. and that Parish cannot find the Settlement of the Father, they shall send it to the Place of its Birth, and that Place must find out the Father's Settlement, or keep the Child. As to the Case of nursed Children, it has always been holden, that Children under seven Years shall go along with the Mother: Therefore if a Man settled in the Parish of A. marry a Widow in the Parish of B. who has

Bastards

Children under seven Years old.

has divers Children under seven Years, and settled in the Parish of *B.* the Children shall go along with the Mother to the Parish of *A.* but this is only for Nuture; and they shall gain no Settlement; but the Parish of *B.* shall take them again, when above the Age of seven Years; and if they become chargeable, the Parish of *B.* shall pay for their Keeping, tho' they still remain with the Mother. To which *Powis* and *Gould* agreed; so the Order was affirmed; *Holt* absent.

Parish of Binfield vers. Banstead.

Order of Removal, ill directed.

(9.) **E**RE Solicitor General moved to quash an Order of Removal made by two Justices; his Exception was, that 'twas wrong directed; for it was directed to the Church-wardens, &c. of *Binsted*, and to the Church-wardens, &c. of *Banstead*, and whom it may concern; also it is not said who to convey or who to receive. The Court seemed to incline, that it ought to be quashed. *Sed adjournatur.*

Queen vers. Davison.

Order to compel the Husband to allow to the Maintenance of his Wife and Family, Quashed.

(10.) **A**N Order of two Justices to compel *Davison* to allow so much a Week for the Maintenance of his Wife and Family. Mr. *Nott* moved to quash the Order, for that the Justices have not Jurisdiction in this Case, it being properly Alimony, and belonging to the Spiritual Court. And (*Holt* being absent), *Powell* said, that the Justices have no Jurisdiction in this Case, but this is not Alimony. If a Man runs away from his Family, he may be punish'd as a Rogue and a sturdy Beggar; but whilst he continues resident, they cannot charge him in this Manner; and quash'd the Order.

Parish

Parish of St. Benedict vers. The Parish of St. Peter's in Norwich.

(11.) SIR James Mountague Attorney General moved to quash an Order of two Justices of the Peace, for the County of the City of *Norwich*, made upon the Stat. 43 *Elix.* which enacts, That if any Parish is not able to maintain its Poor, that then two Justices may tax other Parishes and Places, and the whole Hundred also, (if need requires); and where the Hundred is not able, Justices in Sessions may tax the County in Part or wholly at their Discretions.

His Exception to the Order was, that it does not appear that the Parishes taxed are within the Hundred; for it is only said, that they are within the County of the City of *Norwich*; and two Justices by the Act have not Power to tax the County, but only the Hundred, or the Parishes within the Hundred.

Sir *Edw. Northey* cont. If two Justices cannot relieve in this Case, there can be no Relief given; for 'tis well known there are no Hundreds within Cities, and the City and the County of the City are the same. Indeed *London* has Wards which resemble Hundreds, but no other City; and the Power given to the Justices in Sessions must arise upon a Defect in the Hundred; and where there is no Hundred there can be no such Defect; and that the Sessions could have made no Order in this Case.

Mr. *Raymond*, the same Side with Sir *Edward Northey*. The Question is, whether a City is within the Statute; for the Session's Jurisdiction arises only upon the Insufficiency of the Hundred. This Statute is only a directory and remedial Law; and as in the Case of the Statute of Hue and Cry, which direct, that Oath shall be made before a Justice of the Hundred, where the Felony was committed, yet this may be to the next Justice, tho' not of the Hundred.

Powell: This is not *Casus omiffus* out of the Statute; and tho' the two Justices have not Power, here being no Hundred, yet the Sessions have a Jurisdiction, and may tax the County of the City in Part or at large. To which the rest agreed, and, *Holt absente*, quash'd the Order; being made by two Justices only.

Anonymus.

Motion to bring Money into Court.

(12.) **I**N an Action brought upon a Policy of Insurance, *Pengelly* moved for Leave to bring 15 l. into Court, being as much as they thought their Average of the Damage came to; (the Goods not being lost, but only damaged,) and so the Plaintiff to proceed upon Peril of Costs. *Powell*: The Motion cannot be granted, tho' we have granted it in a *Quantum Meruit*, and also in Covenant for Payment of Money: But in Covenant for Repairs we have denied it; and so we must here.

Queen vers. Lane.

Mandamus.

Writing a Libel no Cause of Removal till Conviction.

Resignation may be by Parol.

(13.) **A** *Mandamus* directed to the Corporation of *Gloster*, to restore *Lane* to the Place of a Capital Burgess; they return, that *Lane* wrote a certain scandalous Letter to one of the Aldermen, amounting to a Libel; and being charged therewith at a Court held, &c. he consented to be turned out. *Per Cur'*, The Common Council are not Judges of a Libel; for that is only triable at Common Law. And suppose it be a Libel, he should be convicted of it at Common Law before it can be alledged as a Cause of Removal; and as to his Resignation, if they had designed it to be a Cause of Removal, it should have been returned otherwise; for here they summoned him to shew Cause why he should not be turned out for Writing a Libel; and he appears and says, you may turn me out if you will, but I will bring a *Mandamus*, and so he does; This certainly is no Resignation. Tho a Resignation may be by Parol, according to Sir *Jonathan Jennings's* Case; but

but then it ought to have been returned more certain and solemn. So the Court granted a peremptory *Mandamus*; Holt *absente*.

Queen vers. Shepherd.

(14.) MR. Raymond moved to amend a faulty Inquisition of a *Felo de se*; (not saying *super visum Corp.*) he said, this is like the Case of a Caption of an Indictment, which may be amended; and cited 1 Sid. 225, 229. Amendment of an Inquisition.

Sir Edw. Norbey *cons.* The farthest they can go is to amend the Caption of an Indictment. But it was settled in the Case of the *Queen vers. Burdy*, 7 Annæ Regina, that an Inquisition cannot be amended.

Powell: The Coroner can amend only Matter of Form.

Notes; Some other Exceptions were, viz. that it is said to be taken *coram Coronatoribus Dom' Reg'*, but does not say for what Place; and that 'tis said, *per Sacramentum duodecim virorum A. B. C.* without *proborum & legalium Hominum*, nor for what Place. Exceptions to an Inquisition.

Mr. Raymond, seeing the Court was against him, moved to quash the *Certiorari*; because it sets forth, that there was an Inquisition *nuper Capt'*, (and the common Form is only *Capt'*); and it appears upon the Return to be taken after the *Teste* of the *Certiorari*, for that is 28 Nov. 8 Annæ Regina, and the Inquisition is 4 Jan. and it being *super Capt'*, shall tie it down to an Inquisition taken before. Certiorari Teste before the Inquisition.

Sir Edw. Norbey *cons.* The *Certiorari* is well, as Writs of Error may be taken out before any Judgment given, and yet well.

Powell, (Holt *absente*), *Capt'* and *nuper Capt'* the same in this Case. 'Tis usual to take out *Certiorari's* before the Inquisition is found, as a Writ of Error may be taken out as soon as the Action commences. Q.

Then Mr. Raymond desired to have a *Melius Inquirend'*. But *per Cur'*, It is usual to grant one in this Case; for the Inquisition must be *super visum Corporis*. Let the Inquisition be quashed; and if you will have a *Melius Inquirend'*, rend'

rend, it must be upon another Motion, and not grafted upon this.

Hern vers. Dryden.

Award to assign over his Apprentice, void.

(15.) **D**EBT upon an Arbitration-Bond; the Award was, that the Defendant should make an Assignment sufficient in Law of *Y. S.* his Apprentice, to the Plaintiff; and it was resolved by the Court, *viz. Powell, Powis and Gould, (Holt absent,)* That the Award was ill; because the Assignment could not be without the Assent of the Apprentice; and an Award for a Man to do a Thing which is not in his Power to do, without the Consent or Concurrence of another, is void. *Powell* Justice said, That by the Custom of *London*, if a Master leaves off Trade, he may assign over his Apprentice, but then the Apprentice may chuse his Master; but such Assignment will not hold in any other Place.

Custom of *London*, of assigning over his Apprentice, void.

Anonymous.

Bailiffs of Liberties and Sheriffs, what Punishment for not returning Writs.

(16.) **I**T was held by *Powell, Powis and Gould* assenting, (*Holt Ch. J.* absent), that this Court cannot amerce Bailiffs of Liberties, for not returning of Writs, &c. But the Court can make a Rule for them to make a Return, and for disobeying that, bring them into Contempt; but Sheriffs, and all that are Officers of the Court, the Court can amerce. Lately indeed we did amerce the Bailiff of *Westminster*; but that was wrong.

Anonymous.

Writ of Error (*sans Notice*) a *Superfideas* to Execution.

(17.) **M**Otion to set aside an Execution, executed after a Writ of Error allowed; The Court held, that tho' there was no Notice given to the Plaintiff's Attorney, of the Allowance of the Writ of Error, yet it was

a *Supersedeas* to the Execution: But to bring the Attorney into Contempt, he must have had Notice. Motion granted. Contempt.

Queen vers. Depuke.

(18.) **M**R. Raymond moved to quash an Indictment of forcible Entry; which sets forth, that the Defendant enter'd forcibly into the Close of J. S. and turned him out; whereas before the Time J. S. *Possessionatus* fuisset *de Termino ult' elaps'*; his Exception was, that the Estate of J. S. should have been particulary set forth, for he might have been Tenant at Sufferance; and it has been often adjudged, that Tenant at Sufferance is not within the Statute of forcible Entries; likewise he said, that by the Word *fuisset*, it does not appear, but that the Estate of J. S. was determined before the Entry. *Ergo* quashed *per Cur'*; Holt *absente*.

Forcible Entry upon the Estate of J. S. and does not shew what Estate J. S. has.

Tenant at Sufferance not within the Statute.

Queen vers. Brown.

(19.) **T**HE Defendant was indicted for not repairing a Highway; he pleaded, that the Inhabitants of D. ought to repair it, *absque hoc*, that he ought, whereupon Issue being joined, the Defendant offer'd to give in Evidence, that it was not a Highway. But Verdict being against him, and that Point saved, at the Assises of York, for the Opinion of this Court; this Term it was resolved by Powell, Powis and Gould, upon the Motion of Lutwyche, that this ought not to have been given in Evidence; because the Defendant had confessed it to be a Highway by his Plea; for if he would have contested that Point, he should have pleaded Not guilty.

Highway. Confession by Pleading.

Leuknor vers. Plant.

(20.) **C**ASE, the Plaintiff declares, that the Defendant Sarah, being a common Carrier, and using to carry Goods *pro Mercede* between Worcester and Litchfield,

Assumpsit, and no Breach alleged. Pleas and Pleadings.

the Plaintiff delivered to her a Guinea, to carry and deliver to her Son T. and that Sarah, the Defendant, in Consideration of so much for Carriage promised the Plaintiff *Alice quod ipsa eadem Sara denar' præd', &c. salvo portaret, & eosdem eidem T. cum postea requisit' esset deliberaret, præd' tamen Sara non deliberasset licet eadem Sara sæpius per eandem Aliciam requisit' fuit, sed ill' eidem Aliciæ deliberare præfati Sara omnino recusavit, &c.* After Verdict for the Plaintiff, it was moved in Arrest of Judgment, and objected by Mr. Raymond, that the Narr' sets forth no Breach of Promise, for there is no Request to pay to Thomas, to whom the Money is to be delivered; and if no Breach, then no Cause of Action: And tho' the Plaintiff in this Case might have countermanded the Gift, any Time before an Action brought by T. and consequently might have had an Action for it against the Defendant, yet that Action must not have been Case, but Trover or Detinue; and therefore here is no Foundation for this special Action, without shewing a Request to deliver it to Thomas.

Sed per Cur', It being said generally, that she requested the Defendant to deliver it, tho' not said to whom, and it being after Verdict, they held it well; and gave Judgment for the Plaintiff; *Holt egrotò.*

Foster vers. Burdett.

Pleas and Pleadings. False Pleas in Bar to a *Scire facias quare Execut' non*, rejected.

(21.) WRIT of Error out of C. B. the Defendant in Error sues a *Scire facias quare Execut' non*, &c. to which the Plaintiff pleads a sham Plea in Bar; and Mason moved, that the Plea might be rejected; and per Powell J. tho' the Plaintiff may plead false Pleas in Bar, such Pleas not being within the Statute for the Amendment of the Law so as to compel the Party to make Oath of the Truth of his Plea; yet since this *Scire facias* is only to compel the Plaintiff to assign Errors, the Court will not suffer such Pleas, whereby the Defendant is delay'd of his Execution; for if such Pleas are allowed, the Court cannot make a Rule to assign Errors till the Plea be determined.

Therefore

Therefore if upon two *Nibils*, or a *Scire feci* returned, if the Plaintiff do not come and assign Errors, or plead a good Plea to the *Scire facias*, the Court will give Rules to assign Errors, or *Nonpross* him upon the Writ of Error.

This Plea being rejected; at another Day in this Term the Plaintiff assigned his Errors; which appeared to be no Errors; and since it was only for Delay, the Counsel for the Defendant moved they might be rejected. But his Motion was denied *per Cur'*; Holt *absent*. [It seems the Court intended to let the original Plaintiff have his Execution, for Want of assigning Errors.] Sham Error.

Ode vers. Young.

(22.) JUDGMENT in an Inferior Court reversed; for that it was, *Ideo consideratum est*, and not said *per Cur'*. Judgment *Ideo considerat*, and not *per Cur'*.

Bishop vers. Morgan.

(23.) DEBT upon a Bond; and upon Oyer the Defendant demur'd, and shew'd for Cause, that the Bond was void, being *Noverint universi, &c. me J. S. teneri & firmiter obligari Richardo — de Woodstreet, &c. solvend eidem Richardo Bishop*. But the Court held the Bond good; and gave Judgment for the Plaintiff. Obligation with a Blank.

Anonymus.

(24.) MR. Jenkins moved for a special *Ac etiam* in Trespass, for lying with the Plaintiff's Wife, which was granted; and held the Defendant to 50*l.* Bail. *Ac etiam.*

N.B. Affidavits were produced of the *Indecent Liberty* they took together.

Riley vers. Adams.

Issue, Resig-
nation or not,
must prove
Acceptance.

(25.) **D**EBT upon a Bond condition'd to perform Co-
venants in an Indenture, wherein the Defen-
dant being a Parson covenanted to let the Plaintiff enjoy
the Rectory, which the Defendant as Parson had demised
to him; the Defendant pleads Performance generally;
the Plaintiff replies, and shews a Breach, that the De-
fendant resigned the Benefice into the Hands of the
Bishop, by which he could not hold the Rectory; the
Defendant rejoined, that he did not resign; upon which
Issue is joined; and upon the Trial at *Guild-hall*, before
Powell Just. the Plaintiff gave in Evidence the Defendant's
Answer in Chancery, wherein he confessed he signed a Re-
signation, &c. *Sed per Powell J.* This is not sufficient with-
out also proving that the Bishop accepted it; and for
Want of such Proof the Plaintiff was Nonsuit.

When a Bill
in Chancery
may be read
as Evidence.

Note; Upon producing the Bill in Chancery, *Whitacre*
objected, that it could not be read as Evidence, not being
taken off the File, but only from the Custody of one of
the six Clerks. But *Powell* said, it might be read, (on
Swearing the six Clerk), and so it had always been held.

Memorand, Soon after the End of this Term the Lord
Chief Justice *Holt* died; and was in the following Term
succeeded by Sir *Thomas Parker*, Knight and Serjeant at
Law; afterwards Earl of *Macclesfield*, and Lord Chancellor
of Great Britain.

De quo dicendum est!

(24.) **M**R. *Jenkins* moved for a special Assize in *Tiel*
parish, for lying with the Plaintiff's Wife, which
was granted; and held the Defendant to 500. Bail.
N. B. Affidavits were produced of the Indenture &c.

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